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2. 4.

No. 11012

2409

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

CERTIFIED SECURITIES, INC., an Oregon
Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUL 2 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11012

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UNITED STATES OF AMERICA,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Certified Securities, Inc., to the Com- plaint	49
Answer of Defendant Polk County to Petition for Condemnation	16
Answer of Oregon Mutual Life Insurance Com- pany to the Petition	17
Exhibit B—Assignment of Mortgage	32
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on	65
Designation of Contents of Record on.....	63
Notice of	60
Statement of Points on, Appellant's (CCA)	67
Statement of Points on, Appellant's (DC)	61
Certificate of Clerk to Transcript of Record on Appeal	65
Declaration of Taking	8
Schedule A—Land Description and Tract Map	11
Designation of Contents of Record on Appeal	63

In the District Court of the United States
for the District of Oregon

Civil No. 1789

UNITED STATES OF AMERICA,

Petitioner,

v.

CERTIFIED SECURITIES, INC., an Oregon
corporation; ERNEST SCHULD; OREGON
MUTUAL LIFE INSURANCE COMPANY,
an Oregon corporation; POLK COUNTY, a
municipal corporation and political subdivision
of the State of Oregon,

Defendants.

PETITION FOR CONDEMNATION

Leave of Court having been obtained, your petitioner United States of America, through its attorneys, files this petition for condemnation and respectfully represents to this Honorable Court as follows:

I.

That the defendant Polk County is a municipal corporation and political subdivision of the State of Oregon and is by law vested with the power to sue and be sued in its own name;

II.

That this proceeding is instituted pursuant to and under authority of the following Acts of Congress:

The Act of August 1, 1888 (25 Stat. 357, 40 U. S. C. Sec. 257);

The Act of February 26, 1931 (46 Stat. 1421, 40 U. S. C. Sec. 258a) and Acts supplementary thereto and amendatory thereof;

The Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U. S. C. Sec. 171), and March 27, 1942 (Public Law 507—77th Congress);

The Act of April 28, 1942 (Public Law 528—77th Congress);

III.

That pursuant to and under authority of the Acts of Congress above cited and referred to, the Secretary of War of the United States of America (1) has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the expansion of Camp Adair, Oregon, and for such other uses as may be authorized by Congress or by Executive Order; (2) has U. S. v. Certified Securities, Inc., et al., Petition for Condemnation—1. [1*] determined and is of the opinion that it is necessary and advantageous to the interest of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for the public use and purpose of adequately providing for the expansion of a military training camp and for re-

*Page numbering appearing at foot of page of original certified Transcript of Record.

lated military purposes, and that said lands are required for immediate use; and (3) has made application to the Attorney General of the United States to cause this proceeding to be commenced, in pursuance of which application the Attorney General has authorized and directed this proceeding to be instituted;

IV.

That the estate taken by the petitioner in this proceeding is the full fee simple title in and to the hereinafter described lands, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines;

V.

That the lands condemned by and through this proceeding are located in Polk County, Oregon, within this judicial district, and are more particularly described as follows:

Tract No. A-240: Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North $22^{\circ} 57'$ West 39.93 chains to the place of beginning, containing 320 acres of land; more or less, all in Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon, and that a plan showing

the above-described lands is marked Schedule "B" attached to the declaration of taking on file herein;

VI.

That the public use for which the hereinabove described lands are taken is adequately to provide for the expansion of a military training camp, and for related military purposes;

VII.

That funds for the acquisition of the hereinabove described lands have been appropriated by the aforesaid Act of Congress approved April 28, 1942 (Public U. S. v. Certified Securities, Inc., et al.,—Petition for Condemnation—2. [2] Law 528—77th Congress), and that the Secretary of War of the United States has declared that he is of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor;

VIII.

That the petitioner has caused diligent search to be made among the public records of the State of Oregon and of Polk County, wherein the above-described lands are located, to determine the names of the owners and the names of every other person interested in the lands taken herein or any part thereof, and that all of said persons insofar as can be ascertained from the public records have been made parties to this proceeding;

IX.

That the petitioner has done and performed every act and thing required by law to be done by said petitioner as a condition precedent to the bringing and maintaining of this action;

X.

That this proceeding was originally a part of the cause entitled *United States v. N. Albert Nelson, et al.*, Civil No. 1304, wherein on the 18th day of August, 1942, this Court entered an order granting possession to the United States of America as of said date of the lands hereinabove described, along with other lands included in said proceeding; that simultaneously with the filing of this petition on this, the 4th day of February, 1943, there is also filed a declaration of taking in which the Secretary of War of the United States has estimated that the sum of \$15,009.00 is just compensation for the taking of the interest hereinabove set forth in and to the hereinabove described lands and that this amount, to-wit: \$15,009.00 is deposited into the Registry of this Court under the provisions of the Declaration of Taking Act approved February 26, 1931 (46 Stat. 1421; 40 U. S. C. 258a).

Wherefore, your petitioner prays:

(a) That this Court make an order reciting the filing of the declaration of taking and petition herein and the depositing into the Registry of this Court of the estimated just compensation for the taking herein of the above U. S. v. Certified Securities, Inc., et al.,—Petition for Condemnation—3. [3]

described lands and the effect thereof as to the vesting of title in the United States of America to said lands, subject to the limitations and exceptions hereinabove set forth, and granting immediate possession of said lands under said declaration of taking to the petitioner United States of America; and

(b) That this Honorable Court take jurisdiction of this cause and make and have entered herein all such orders, judgments and decrees as may be necessary to determine the ownership of the above-described lands, and to fix the value of the same and the amount of compensation to be paid by petitioner to whoever may be adjudged to be the owner or owners of the above-described lands, and to make and have entered all such further orders, judgments and decrees as may be necessary to vest the title to the estate or interest hereinabove set out in and to the lands hereinabove described in the United States of America and to make just distribution of the estimated and final award among those entitled thereto as expeditiously as possible.

BERNARD H. RAMSEY,

Special Assistant to the Attorney General;

JOHN E. WALKER,

WILLIAM L. DICKSON,

STANLEY R. DARLING,

JAMES LEAVY,

BERT C. BOYLAN,

HARRY D. BOIVIN,

Special Attorneys, Department of Justice,

/s/ JOHN E. WALKER

State of Oregon,
County of Multnomah.

I, John E. Walker, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Special Attorney of the Department of Justice; that I am possessed of information from which I have prepared the foregoing petition for condemnation; that the allegations therein contained are true as I verily believe.

/s/ JOHN E. WALKER

Subscribed and sworn to before me this 4th day of February, 1943.

[Seal] /s/ BERT C. BOYLAN
Notary Public for Oregon.

My commission expires: 5/6/45.

[Endorsed]: Filed Feb. 4, 1943. [4]

[Title of District Court and Cause.]

No. 33

DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. sec. 258a), and acts supplementary

thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress, which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The expansion of a military training Camp, and for related military purposes. The said lands have been selected by me for acquisition by the United States for use in connection with the expansion of Camp Adair, Oregon, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use. [5]

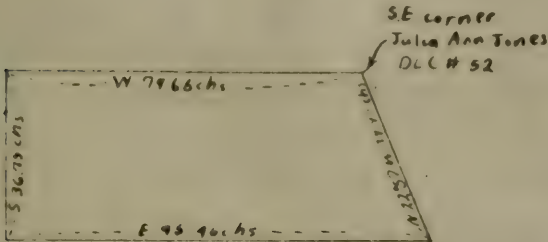
2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of part of the same lands described in the petition in the case United States, petitioner, vs. N. Albert Nelson, et al., and 25,500 acres of land, more or less, in Polk County, Oregon, Civil No. 1304, in the District Court of the United States for the District of Oregon from which case the lands described in this Declaration of Taking will have been severed prior to the filing hereof.

T 9 S T 9 S
R 6 W R 5 W
S 12 S 7

TRACT "A" (WITHOUT GRID)

Project symbol no. P-7132 Tract No. A-240
Name of owner Certified Securities, Inc.
Field work by _____ Date _____
Description of tract _____

1" = 2000'
(SCALE: 1" equals 1 mile)



86 W
R 5 W
12 7
13 18

CLASSES OF LAND

Crop land _____ ()
Pasture land _____ ()
Forest land _____ ()
* _____ ()

(The grades of each class of land must be shown on the map proper.)

*Name of any other class of land involved.

I certify that this is an accurate map of tract A-240, based on Deed Description, which shows this tract to contain 319.8¹ acres.

Joel C. Burnell
(Name)

Draftsman
(Title)

9-8-92
(Date)

Indicate whether map is based on General Land Office records, actual survey of tract, or deed to vendor from former owner, or indicate the nature of other information used.

[Title of District Court and Cause.]

JUDGMENT ON THE DECLARATION OF TAKING AND ORDER OF POSSESSION

This matter coming on upon motion of the petitioner United States of America, by and through its attorneys of record, for a judgment on the declaration of taking and order of possession, and a hearing having been held in open Court on said motion, and the Court having considered said declaration and the petition for condemnation heretofore filed herein, Finds: First: That the United States of America is empowered by law to acquire property by condemnation under judicial process for the use and purposes set forth in said declaration of taking and said petition for condemnation; Second: That this proceeding was instituted and the petition for condemnation and declaration of taking herein were filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the lands described in said petition and declaration of taking, and at the direction of the Attorney General of the United States, the person authorized by law to direct the institution of such proceedings; Third: That said declaration of taking was filed on February 4, 1943, and simultaneously therewith, the sum of \$15,009.00 was deposited in the Registry of this Court in this cause as the estimated just compensation as set forth in said declaration of taking, and that said declaration of taking contained (1) a statement of authority under which and the public use for which

the lands described therein were taken; (2) a description of the lands taken sufficient for identification thereof; (3) a statement of the estate or interest taken in said lands for said public use; (4) a plan showing the lands taken; (5) a statement of the sum of money estimated by the Secretary of War of the United States to be just compensation for the taking of the [9] lands described therein; and (6) a statement by the said Secretary of War that in his opinion the ultimate award for the taking of said lands will probably be within any limits prescribed by law as the price to be paid therefor; Fourth: That possession of the lands described in said declaration of taking and petition for condemnation on file herein was granted to the United States of America as of August 18, 1942, by order of this Court made and entered on that date in the case of United States of America v. N. Albert Nelson, et al., Civil No. 1304. Now, Therefore, it is hereby Ordered, Adjudged and Decreed: (1) That the full fee simple title in and to the lands described in the petition for condemnation and in the declaration of taking on file herein, and which are described as follows:

Tract No. A-240: Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence west 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North 22° 57' West 39.93 chains to the place of beginning, containing 320 acres of land; more or less, all in Polk County, Oregon, said land above described being the North one-half of the Donation

Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon, became and was vested in the petitioner United States of America as of February 4, 1943, the date of the filing of said declaration of taking herein and the depositing into the Registry of this Court of the amount of estimated just compensation, free and discharged of all claims and liens of every kind whatsoever, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines; (2) That on said date, to-wit: February 4, 1943, the right to receive just compensation for the taking of the interest hereinabove set out in the lands hereinabove described, vested in the person entitled thereto, and that the amount of just compensation to be paid for the taking of said lands shall be ascertained and awarded in this proceeding as established by judgment herein, pursuant to law; and (3) That possession under said declaration of taking of the lands hereinbefore described be delivered forthwith to and taken by the petitioner United States of America.

/s/ JAMES ALGER FEE

District Judge.

Dated at Portland, Oregon, this 4th day of February, 1943.

[Endorsed]: Filed Feb. 4, 1943. [10]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT POLK COUNTY
TO PETITION FOR CONDEMNATION

Now comes the defendant Polk County, a municipal corporation and political subdivision of the State of Oregon, and for its answer to the petition herein Alleges that no taxes are due said defendant upon the real property described in said petition.

BRUCE SPAULDING

District Attorney

By R. S. KREASON

Deputy

State of Oregon,

County of Polk—ss.

I, Bruce Spaulding, being first duly sworn, on oath say that I am the duly elected, qualified and acting District Attorney of Polk County, Oregon, and that the facts set forth in the foregoing answer are true as I verily believe.

BRUCE SPAULDING

By R. S. KREASON

Deputy

Subscribed and sworn to before me this 13th day of February, 1943.

[Seal]

EDNA M. PITZER

County Clerk

[Endorsed]: Filed Feb. 18, 1943. [11]

[Title of District Court and Cause.]

ANSWER

Comes now Oregon Mutual Life Insurance Company and by way of answer to the petition herein respectfully shows:

I.

Oregon Mutual Life Insurance Company is a corporation duly organized and existing under and by Virtue of the terms of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, County of Multnomah, State of Oregon.

II.

Kaufman Mortgage Company is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with its principal office and place of business in the City of Portland, Multnomah County, Oregon.

III.

Certified Securities, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

IV.

On the 11th day of April, 1942, defendant Certified Securities, Inc. made, executed and delivered to Kaufman Mortgage Company its promissory note in writing, bearing date the 11th day of April, 1942, in words and figures substantially as follows:

“\$4,500.00

Portland, Oregon, April 11, 1942

For Value Received, I promise to pay to the order of Kaufman Mortgage Company, a corporation organized under the laws of the State of Oregon, at its office at the Porter Building, Portland, Oregon, or at such other place as the holder hereof may from time to time designate in writing, the principal sum of Four Thousand Five Hundred and No/100 Dollars, with interest at the rate of (5%) Five percent per annum from April 11, 1942, payable in lawful money of the United States as follows:

10 successive annual installments due and payable on December 1, each year commencing on the first day of December, 1942, the first 9 of said installments being in the sum of Three Hundred Sixty-Eight and 10/100 Dollars (\$368.10) each, and the last installment being in the full amount of the then remaining balance of principal and interest; and each installment to be applied first to the payment of interest and then principal.

Privilege is reserved to make additional payments to apply on principal of \$100.00 or multiples thereof on interest pay dates after one year.

This note evidences a loan and is secured by a Real Estate Mortgage of even date. In the event of default in the payment of any installment of principal or interest, the holder of this note may, at its option, and without notice, declare all the unpaid principal and accrued interest of said note immediately due and payable. Failure to exercise this option shall not constitute a waiver of the

right to exercise the same in the event of any subsequent default.

In the case of default, if this note is placed in the hands of an attorney for collection, I agree to pay a reasonable sum as attorneys' fees.

CERTIFIED SECURITIES,
INCORPORATED,

An Oregon Corporation

By EDWARD K. PIASECKI (Sg'd)

Pres.

By ROSE A. MORGALI (Sg'd)

Sec.

Edward K. Piasecki (Sg'd)."

Endorsed on back as follows:

"Without Recourse Pay to the Order of
Oregon Mutual Life Insurance Company
Kaufman Mortgage Company
By K. C. Kaufman (Sg'd)

The proceeds of the loan evidenced by this note having been disbursed on 5-25-42.

Interest is rebated from 4-11-42 to 5-25-42 for \$27.50."

V.

Said defendant Certified Securities, Inc. was on the 11th day of April, 1942, the owner and in possession of certain real property in Polk County, Oregon, more particularly described as

Beginning at the southeast corner of the Julia Ann Jones DLC No. 52, running thence West 79.66 chains, thence South 36.75 chains, thence East 95.46

chains, thence North 22° 57' West 39.93 chains to the place of beginning, containing 320 acres, of land, more or less, all in Polk County, Oregon, and more particularly described as Claims No. 39 and No. 53 Not. No. 2697 Township 9 South, Ranges 5 and 6, West of Willamette Meridian, Polk County, Oregon, such land being the north half of the DLC of Jonathan Liggett and wife. [13]

On said date to secure the payment of the principal and interest of said note, according to the tenor thereof, it did at the same time and place execute in its corporate name and under its corporate seal and deliver to Kaufman Mortgage Company a certain mortgage bearing date the 11th day of April, 1942, and conditioned for the payment of the sum of Four Thousand Five Hundred Dollars (\$4,500.00) lawful money of the United States of America, and interest thereon at the rate and at the time and in the manner provided in said mortgage and said promissory note, and according to the terms and conditions thereof, which said mortgage was duly acknowledged and certified so as to entitle the same to be recorded, and the same was thereafter, to-wit, on the 20th day of May, 1942, duly recorded in the office of the County Recorder of Polk County, Oregon, in Book 72, page 625 et seq. Records of Mortgages for said Polk County, Oregon, a copy of which said mortgage with endorsements thereon is hereto attached marked Exhibit A and by reference thereto incorporated in and made a part of this answer.

VI.

Subsequent to the execution of said mortgage, the said Kaufman Mortgage Company by an instrument in writing duly acknowledged and certified so as to entitle it to be recorded, assigned said mortgage and the debt secured thereby to defendant Oregon Mutual Life Insurance Company, which said assignment of mortgage was duly recorded in Book 73, page 57, Records of Mortgages for Polk County, Oregon, on the 10th day of July, 1942, a copy of which said assignment of mortgage with the endorsement thereon is hereto attached marked Exhibit B and by reference thereto incorporated in and made a part of this answer.

VII.

Oregon Mutual Life Insurance Company is now the holder and owner of said mortgage and the lien and rights under said mortgage and assignment securing the indebtedness. **No part of the principal** of said promissory note or the interest thereon has ever been paid, save and except the sum of Two Hundred Fifty-one and 85/100 Dollars (\$251.85) on principal and interest [14] on the entire indebtedness to December 1, 1942, and there is now due and owing to this defendant, Oregon Mutual Life Insurance Company, the balance on principal in the sum of Four Thousand Two Hundred Forty-eight and 15/100 Dollars (\$4,248.15), together with interest thereon at the rate of five per cent (5%) per annum from and after December 1, 1942, which said sums are secured by a first mortgage lien upon

the real property sought to be condemned by the United States Government in this proceeding.

VIII.

This answering defendant invokes the benefits of an applicable Act of Congress (U. S. Code Annotated, Title 40, Section 258a) providing

“Upon the filing of a declaration of taking the Court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The Court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.”

Wherefore, this answering defendant prays that the decree, order or judgment to be entered herein shall provide expressly that prior to the passing of title to the United States of America for the property hereinabove described and mentioned, and described in plaintiff's petition, that there be awarded and paid to Oregon Mutual Life Insurance Company out of the funds now on deposit in this Court, or out of other funds provided for the payment of said property, the full sum of Four Thousand Two Hundred Forty-eight and 15/100 Dollars (\$4,248.15), together with interest thereon at the rate of five per cent (5%) per annum from and after December 1, 1942, and that this defendant may have such other and further relief as to the

Court may seem equitable and proper in the premises.

TEAL, WINFREE, McCUL-
LOCH, SHULER & KELLEY
A. B. WINFREE

Attorneys for Defendant Oregon Mutual Life
Insurance Company. [15]

State of Oregon

County of Multnomah—ss.

I, R. W. R. Calderwood, being first duly sworn
on my oath depose and say:

I am Secretary of Oregon Mutual Life Insurance
Company, the answering defendant herein; I have
read the within and foregoing Answer and know the
contents thereof, and the same is true as I verily
believe.

R. W. R. CALDERWOOD.

Subscribed and sworn to before me this 16th day
of February, 1943.

[Seal]

A. B. WINFREE

Notary Public for Oregon.

My Commission expires: January 11, 1944.

[Endorsed]: Filed Feb. 18, 1943. [16]

This mortgage, made by Certified Securities, In-
corporated, an Oregon Corporation, of Polk
County, Oregon, herein called the mortgagor, and
Kaufman Mortgage Company, a corporation,
mortgagee.

Witnesseth: That the mortgagor in consideration of the sum of \$4,500.00—four thousand five hundred and no/100 dollars to them in hand paid by the mortgagee, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the mortgagee the following described real estate situated in Polk County, Oregon, to-wit:

Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North 22° 57' West 39.93 chains to the place of beginning, containing 320 acres of land, more or less, all in Polk County, Oregon, and more particularly described as Claims #39 and #53, Not. No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian, Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife.

Together with all and singular the tenements, hereditaments, improvements, privileges and appurtenances thereto belonging or in any wise appertaining, including homestead exemption and all and singular the right, title and interest of the said mortgagor at law or in equity; together with all reservoir rights, drainage ditches and water rights of every nature however evidenced, with all rights of way, ditches, pumping sites, machinery, or other physical properties now used or for conveyance of water to or from or attaching or belonging to said land or by the mortgagor for use thereon, or which

may be hereafter acquired for and used on or with said land. To have and to hold the same, unto the said mortgagee forever.

This mortgage secures the payment of a loan of (\$4,500.00) Four Thousand Five Hundred and No/100 Dollars together with interest thereon as evidenced by a certain promissory note of even date herein signed by the mortgagors and payable to the mortgagee at his principal office in Portland, Multnomah County, Oregon, which loan accrues according to the terms of said note on December 1, 1951. This conveyance secures any and all renewals and extensions of the whole or part of said indebtedness however evidenced with interest and any change in the terms or rate of interest shall not impair in any manner the validity of or priority of this mortgage or release the mortgagor from personal liability for the debt hereby secured. That this mortgage shall be subrogated to the lien, although released of record, of any prior encumbrance on the said premises paid or discharged from the proceeds of the loan represented by the afore-said promissory note. The right is hereby given by the mortgagor and [17] reserved by the mortgagee to make partial releases of the security herein described if agreeable to the mortgagee without notice to or the consent, approval or agreement of any other parties in interest, which partial releases shall not impair in any manner the validity or priority of this mortgage on the security remaining or without modifying the covenants, conditions, or

lien of this obligation or the original liability of the mortgagors either in whole or in part.

It is hereby agreed that wherever used in this instrument the word "Mortgagor" includes the undersigned and all persons who succeed to their interest in the aforementioned real property, and the word "Mortgagee" includes the mortgagee's administrators, executors, and assigns and all persons who succeed to his interest in this obligation.

The said mortgagor further covenants and agrees with the mortgagee as follows and will:

First.—Pay the sums of money hereby secured and has good right to sell and convey said land, and hereby warrants and will defend the same unto the said mortgagee forever, as a first and prior lien upon said premises.

Second.—Pay all taxes, assessments and charges of every kind levied or assessed against said real estate before delinquent; also all taxes assessed in Oregon against said mortgagee on this mortgage, note or debt secured hereby, before the same become delinquent, if the amount of such tax plus the interest exceeds the maximum amount permitted by law the excess to be paid by the mortgagee; to pay all dues, or assessments upon drainage ditch, water rights or water stock; to immediately deliver to mortgagee receipts showing such payments; in case of the mortgagor's failure the mortgagee may pay the same; pay all the expenses incurred by the mortgagee and a reasonable attorney's fee, if, because of default, the note secured hereby is given to an attorney for collection and payment be made

before suit is filed. To construct or maintain drainage ditches as may be necessary to prevent depreciation of land on account of becoming too wet, either from sub-irrigation or excess of surface water; to maintain the supply of water for irrigation and domestic purposes equal to that now used or which may hereafter be used upon, or attaching to or belonging to said land; and will assign, or pledge to mortgagee all evidences of ownership of reservoir, drainage, ditches and water rights, or physical properties connected therewith in form satisfactory to mortgagee. [18]

Third,—Keep said premises and all buildings, fences, or other improvements thereon in as good condition and repair as the same now are or may be put hereafter; not to permit the buildings on said premises, or said premises to become vacant or unoccupied; not to remove or demolish or to permit the removal or demolition in part or all of any buildings, improvements, fences, fixtures, or appurtenances now on, or that may hereafter exist on said premises; not to cut, sell, sever, or remove fixtures, appliances or conveniences now on or that may hereafter exist on said premises, or to do anything that may weaken or impair the security under this mortgage, or permit the cutting or removal of timber from said premises except for domestic use on said premises.

All fixtures, appliances, appurtenances, or conveniences, whether or not specifically mentioned or enumerated herein and in addition thereto all

shades, screens, pipes, wiring, facilities for pumping water and heating the same, linoleum, hay track and/or fixtures, parts or appliances connected with any of the above items, and/or property now or hereafter attached to the buildings, shall all be construed and regarded as part of the real property and covered by this mortgage.

To keep any orchard on said land properly irrigated, cultivated, sprayed and cared for.

Fourth.—Keep all buildings now on, or hereafter to be erected on said real estate insured at the option and to the satisfaction of the mortgagee in such company as may be designated by said mortgagee; to deliver all policies and the renewals thereof to the mortgagee prior to the date the same take effect. As long as any part of the loan remains unpaid the mortgagors authorize the mortgagee, if he elects, to effect or place the renewals of all insurance on the property described herein in such companies as the mortgagee may select and mortgagor will pay all premiums when due, and this mortgage shall stand as security for the premiums. The mortgagors hereby assign and transfer to the mortgagee all right and interest in all policies of insurance carried or to be carried upon said real estate.

Fifth.—That as additional and collateral security for the payment of said note, mortgagors hereby assign to mortgagee all of the rents, revenues, royalties, rights and benefits payable by occupant, and/or accruing under all tenancies and leases now on said real estate, or which may hereafter be placed

thereon and the tenants, or their assignees are hereby directed on production of a certified copy of this mortgage [19] to pay all rents, revenues, royalties, rights and benefits to mortgagee; this provision to become effective only upon default in the terms and conditions of this mortgage, or prior to such default, upon notice to the tenant, lessee, assignee, or sub-lessee in such lease, and to terminate and become null and void upon release of this mortgage.

Sixth.—Waiver of exercise of any option in one or more instances shall not be regarded as a waiver or relinquishment of the right to exercise such option thereafter.

Not to commit or permit waste on said premises.

Failure of the mortgagor or those having their interest herein to pay such taxes, fire insurance premiums, or to insure or to keep any other conditions herein contained, all as agreed shall constitute waste.

Seventh.—That the failure to pay when due, any sum secured hereby or any renewal or extension thereof, or the failure to comply with any of the covenants or agreements hereof, shall cause the entire debt secured hereby to become due and payable, at the option of the mortgagee, without notice; and in case suit shall be instituted to foreclose this mortgagee, or there is litigation affecting the real estate described herein, the mortgagor agrees to pay in addition to the costs and disbursements allowed by statute, reasonable attorney's fees; also,

that all sums paid by the mortgagee for abstract of title, insurance, taxes, assessments, charges, and attorney's fees, water or ditch dues, rent or assessments, may be collected from the mortgagor immediately or on demand at the option of the mortgagee, with interest from the date of payment at 8%, and shall form a part of the debt secured hereby.

Eighth.—In the event of suit being instituted to foreclose this mortgagee, or if it becomes necessary to carry out the terms and conditions of this mortgage according to its true intent, on motion of the mortgagee the Court may appoint a receiver without notice to preserve and protect the security; to prevent waste; to collect the rents and profits arising out of said premises, during the pendency of said foreclosure and to apply such moneys to the payment of the amount then secured by this mortgage, first deducting all proper charges and expenses and the receiver shall be forthwith entitled to possession of said premises including all crops growing thereon. The mortgagee or receiver shall be accountable only to the extent that moneys or income actually collected are applied as aforesaid, nor shall the exercise of this right and the application of said moneys delay or retard foreclosure. [20]

In witness whereof, the said mortgagor has hereunto set his hand and seal this 11th day of April, A. D. 1942.

[Seal]

**CERTIFIED SECURITIES,
INCORPORATED'**

An Oregon Corporation.

[Seal]

By EDWARD K. PIASECKI

President

[Seal)

By ROSE A. MORGALI

Secretary

[Seal]

By EDWARD K. PIASECKI

State of Oregon

County of Marion—ss

On this 18th day of May, 1942, before me appeared Edward K. Piasecki and Rose A. Morgali both to me personally known, who being duly sworn, did say that he, the said Edward K. Piasecki is the President, and she, the said Rose A. Morgali is the Secretary of Certified Securities Incorporated, a corporation within named, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said officers hereby acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate, written.

[Seal]

JOHN F. STEELHAMMER

Notary Public for Oregon.

My Commission expires 3-28-45.

No. 22545

State of Oregon

County of Polk—ss.

I certify that the within was received and duly recorded by me in Polk County Records, Book of Mortgages No. 72, page 625 on the 20th day of May, 1942, at 4:30 P. M.

C. S. GRAVES

County Recorder

EDNA M. PITZER

Deputy [21]

EXHIBIT B

ASSIGNMENT OF MORTGAGE

Know All Men by These Presents: That the undersigned, Kaufman Mortgage Company, a corporation, Assignor, in consideration of the sum of (\$4,500.00), Four Thousand Five Hundred and No/100 Dollars to the undersigned paid by Oregon Mutual Life Insurance Company, a corporation organized under the laws of the State of Oregon, Assignee, receipt of which is hereby acknowledged has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over unto said Assignee, a certain Mortgage dated April 11, 1942, made and executed by Certified Securities, Inc., an Oregon corporation, as Mortgagors, to Assignor, as Mortgagee, to secure the payment of the sum of (\$4,500.00) Four Thousand Five Hundred and No/100 Dollars, together with the note or obliga-

tion herein described and the money due or to become due thereon, with interest, which said Mortgage was recorded on May 20, 1942, in the office of the County Recorder of Polk County, Oregon, in Book 72, Page 625, of Mortgage Records of said County and State.

To have and to hold the same unto said Assignee, its successors and assigns, for its use and benefit, subject only to the provisions in said Mortgage mentioned.

Said Assignor does hereby covenant to and with said Assignee that the said Assignor is the lawful owner and holder of said Note and Mortgage, and that it has good right to sell, transfer, and assigns the same as aforesaid, and that there is now due and owing upon said Note and Mortgage the sum of (\$4,500.00) Four Thousand Five Hundred and No/100 Dollars, with interest thereon at the rate of (5%) five per-cent per annum, from May 25, 1942.

[Seal]

KAUFMAN MORTGAGE
COMPANY

K. C. Kaufman (Signed)
President

State of Oregon

County of Multnomah—ss.

On this 25th day of May, 1942, before me appeared K. C. Kaufman to me personally known, who, being duly sworn, did say that he is the President of Kaufman Mortgage Company and that the Seal affixed to said instrument is the Corporate

Seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and he acknowledged said instrument to be [22] the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

[Seal] IRMA SEABERG (Signed)
Notary Public for Oregon.

My Commission expires 4-16-46.

(Endorsement on back)

No. 23149—Assignment of Mortgage from Kaufman Mortgage Company to Oregon Mutual Life Insurance Company.

State of Oregon
County of Polk—ss.

I certify that the within was received and duly recorded by me in Polk County Records, Book of Mortgages, at No. 73 Page 57 on the 10th day of July, 1942.

C. S. GRAVES (Signed)
County Recorder
C. S. GRAVES (Signed)
County Recorder.

Filed at 8:25 o'clock A. M.

Service of the within Summons & Answer and receipt of a copy is hereby admitted this 17th day of February, 1943.

EDWARD K. PIASECKI

President of & Attorney for
Certified Sec., Inc.

JOHN E. WALKER

Atty. for Petitioner.

[Endorsed]: Filed Feb. 18, 1943. [23]

[Title of District Court and Cause.]

PETITION FOR ORDER FIXING VALUE
AND DISBURSING FUNDS ON DEPOSIT

Come now the defendant Certified Securities, Inc., an Oregon corporation, by and through its President, Edward K. Piasecki, and its Secretary, Rose A. Morgali, and the defendant Ernest Schuld, for the purpose of petitioning the Court for an order fixing value herein and for the distribution of funds on deposit, and by this, their petition, submit themselves to the jurisdiction of this Court and to the entry of judgment herein, and for such other orders or decrees as may be proper in the matter, and expressly waive the right to the intervention of a jury for the purpose of determining the reasonable and just compensation to be paid for the taking of the hereinafter described land, expressly waive notice of hearing on this petition, and represent to the Court as follows:

I.

That on the 4th day of February, 1943, in the above-entitled cause the United States of America acquired the full fee simple title, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, in and to the following described lands in Polk County, Oregon, to-wit:

Tract No. A-240: Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North $22^{\circ} 57'$ West 39.93 chains to the place of beginning, containing 320 acres of land, more or less, all in Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon,

by filing in said action on said date its declaration of taking and by depositing simultaneously therewith in the Registry of this Court in this cause the sum of \$15,009.00 as the estimated just compensation to be paid for the taking of the [24] lands hereinbefore described and by thereafter filing in this Court its petition for condemnation of said lands;

II.

That immediately prior to the time that title to said land vested in the United States of America

through filing of the declaration of taking aforementioned, the fee simple title to the land hereinbefore described was vested in the Certified Securities, Inc., a corporation organized and existing under the laws of the State of Oregon, subject to a mortgage given on April 11, 1942, to the Kaufman Mortgage Company, and afterwards assigned by the Kaufman Mortgage Company to the Oregon Mutual Life Insurance Company, said mortgage being given to secure a note for \$4,500.00 and being of record in Volume 72, at page 625 of the Mortgage Records of Polk County, Oregon, and subject to a farm lease in favor of Ernest Schuld;

III.

That these defendants have made no transfer or conveyance of their interest in and to said lands or their right and interest in and to the compensation for the taking of said lands on deposit in this cause; that except as hereinbefore mentioned, there are no liens, encumbrances, taxes, assessments or charges of any kind whatsoever against said lands, and that no person other than as herein mentioned has any right or claim in and to the compensation for the taking of said lands; that as of December 1, 1942, there was due and owing to the Oregon Mutual Life Insurance Company by virtue of the mortgage aforementioned the sum of \$4,248.15, with interest to be added thereon at the rate of 5% per annum from and after December 1, 1942;

IV.

That the defendant Ernest Schuld disclaims any right, title or interest in and to the lands taken in this proceeding and waives any claim to any part of the compensation to be paid for said taking;

V.

That the reasonable and just compensation to be paid by the petitioner United States of America for the taking of said lands was and is the sum of \$15,009.00, and it is hereby agreed that said sum of \$15,009.00 was and is the [25] fair market value of the hereinbefore described lands at the time of taking, and that said sum may be fixed by this Court as the reasonable and just compensation to be paid by the petitioner United States of America, and that said sum may be fixed as the full, final and complete award for the taking of said lands.

Wherefore, petitioning defendants pray for an order and judgment of this Court in this cause fixing the fair market value of the land taken in this cause in the sum of \$15,009.00 and authorizing and directing the Clerk of this Court to pay said sum of \$15,009.00 in the following manner: (1) to the Oregon Mutual Life Insurance Company, a corporation, an amount sufficient to discharge in full the mortgage debt due said corporation; (2) to the defendant Certified Securities, Inc., the balance of the sum remaining on deposit herein after payment of the aforementioned mortgage debt, said

payments to be made without charging commission or poundage fees on any part of said sum.

[Seal] CERTIFIED SECURITIES,
INC.,

By /s/ EDWARD K. PIASECKI
President

/s/ ROSE A. MORGALI
Secretary.

/s/ ERNEST SCHULD

State of Oregon

County of Polk—ss.

I, Ernest Schuld, being first duly sworn, on oath depose and say:

That I am one of the defendants in the above-entitled cause; that I have read the foregoing Petition for Order Fixing Value and Disbursing Funds on Deposit, know the contents thereof, and that the same is true as I verily believe.

/s/ ERNEST SCHULD

Subscribed and sworn to before me this 27 day of February, 1943.

[Seal] /s/ J. F. WIENERT

Notary Public for Oregon.

My Commission expires: Apr. 22, 1945. [26]

State of Oregon

County of Marion—ss.

Come now Edward K. Piasecki and Rose A. Morgali, who being first duly sworn, depose and say:

That I, Edward K. Piasecki, am the President

and I, Rose A. Morgali, am the Secretary of Certified Securities, Inc., an Oregon corporation; that I, Edward K. Piasecki, as President, and I, Rose A. Morgali, as Secretary of said corporation, executed the foregoing Petition for Order Fixing Value and Disbursing Funds on Deposit for and on behalf of said corporation; that I, Edward K. Piasecki, President, and I, Rose A. Morgali, Secretary of Certified Securities, Inc., an Oregon corporation, further say that I have read the foregoing petition and know the contents thereof, and that all matters set forth therein are true as I verily believe.

/s/ EDWARD K. PIASECKI,
President.

/s/ ROSE A. MORGALI,
Secretary.

Subscribed and sworn to before me this 23 day of February, 1943.

[Seal] /s/ E. L. CRAWFORD,
Notary Public for Oregon.

My commission expires: May 10/43.

[Endorsed]: Filed March 8, 1943. [27]

[Title of District Court and Cause.]

ORDER FIXING VALUE AND DISBURSING
FUNDS AND FINAL JUDGMENT IN
CONDEMNATION

This matter coming on upon the oral motion of the United States of America, petitioner herein, by and through its attorneys of record, for an

order fixing value and disbursing funds and final judgment in condemnation; and the defendants Certified Securities, Inc., an Oregon corporation, and Ernest Schuld having appeared herein by and through a petition for order fixing value and disbursing funds on deposit wherein the defendant Ernest Schuld disclaims any right, title or interest in and to the lands taken herein or the funds on deposit herein, and the defendant Certified Securities, Inc., alleges itself to have been the owner of the lands condemned herein at the time of taking, submits itself to the jurisdiction of this Court, petitions the Court for an order fixing the fair market value of the lands taken in this proceeding in the sum of \$15,009.00, and authorizes this Court to disburse the sum necessary to discharge the mortgage of the defendant Oregon Mutual Life Insurance Company; and the defendant Oregon Mutual Life Insurance Company, an Oregon corporation, having appeared herein by and through an answer filed in this cause; and the defendant Polk County, a municipal corporation and political subdivision of the State of Oregon, having appeared herein by and through its answer wherein it is alleged that there are no taxes due said county on the lands taken herein; and the Court having heard testimony as to what constitutes reasonable and just compensation to be paid for the taking of the lands described in the petition for condemnation and declaration of taking on file herein and hereinafter described, and having considered the evidence presented as to the rights of the various defendants

to the reasonable and [28] just compensation therefor, and being fully advised as to the law and facts herein, Finds: First: That pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257), the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and Acts supplementary thereto and amendatory thereof, the Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171), and March 27, 1942 (Public Law 507—77th Congress), the Secretary of War was and is authorized to acquire real estate by condemnation under judicial process in the name of the United States of America; Second: That pursuant to said authority the Secretary of War has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the expansion of a military training camp known as Camp Adair, Oregon, and for related military purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined and is of the opinion that the hereinafter described lands are necessary adequately to provide for the expansion of a military training camp and for related military purposes, and that said lands are required for immediate use, and that it is necessary and advantageous to the interest of the United States to acquire the hereinafter described lands by condemnation under judicial process, and that by direction of the Attorney General of the United States, pursuant to the request of the Secretary of War,

this condemnation proceeding was instituted pursuant to the aforementioned statutes for the purpose of acquiring the estate or interest hereinafter set forth in and to the lands so selected; Third: That funds for the acquisition of said lands were appropriated by the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), and that there is on deposit in the Registry of this Court in this cause the sum of \$15,009.00 as estimated just compensation for the taking of the hereinafter described lands under declaration of taking filed in this cause on February 4, 1943; Fourth: That pursuant to the filing of the declaration of taking aforesaid and the deposit of \$15,009.00 as estimated just compensation in the Registry of this Court, the full fee simple title in and to the lands hereinafter described, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, vested in the United States of America, free and discharged of all claimfis of any [29] kind whatsoever; Fifth: That at the time of the filing of the declaration of taking aforesaid in the above-entitled Court the fee simple title to said lands hereinafter described was vested in the defendant Certified Securities, Inc., a corporation organized and existing under the laws of the State of Oregon, subject only to the lien of a mortgage in favor of the defendant Oregon Mutual Life Insurance Company; that the County of Polk, Oregon, has no right, title or interest in and to the lands herein condemned or the funds on deposit in this cause; and that the defendant

Ernest Schuld has no right, title or interest in and to the lands herein condemned or the funds on deposit in this cause; Sixth: That there is now due and owing to the defendant Oregon Mutual Life Insurance Company the sum of \$4,305.38, including principal and interest; Seventh: That at the time of the filing of the declaration of taking aforesaid in this Court, the fair market value of the lands hereinafter described was \$15,009.00, and that said sum is the reasonable and just compensation to be paid for the taking by the United States of America of said lands, subject to existing easements as hereinafter mentioned; Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the full fee simple title to the following described lands in Polk County, Oregon, to-wit:

Tract No. A-240: Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North $22^{\circ} 57'$ West 39.93 chains to the place of beginning, containing 320 acres of land, more or less, all in Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon, and containing 320 acres of land, more or less,

vested in the petitioner United States of America on February 4, 1943, free and discharged of all

liens and claims of any kind whatsoever, subject, however, to easements for public roads and highways, for public utilities, for railroads, for pipe lines; and It Is Further Ordered, Adjudged and Decreed that the sum of \$15,009.00 was as of the date of the filing in this Court of the declaration of taking on February 4, 1943, the fair market value of the lands hereinbefore described, and that said sum, without interest on any part thereof, is the reasonable and just compensation to be paid by the United States of America for the taking of the full fee simple title to said lands, subject to existing easements as hereinbefore mentioned; And It is Further Ordered that the Clerk of this Court [30] be and he is hereby authorized and directed to pay forthwith from the sum of \$15,009.00 on deposit herein (1) to the defendant Oregon Mutual Life Insurance Company, 1029 S. W. Alder Street, Portland, Oregon, the sum of \$4,305.38, in full settlement of all claims of said defendant against said lands or the funds on deposit herein; and (2) to the defendant Certified Securities, Inc., 9 Ladd and Bush Building, Salem, Oregon, the sum of \$10,703.62 in full settlement of all claims of said defendant against said lands or the funds on deposit herein; and it is further directed that said Clerk make said payments without charging commission or poundage fees thereon, and that said Clerk take the receipts of said defendants for said payments.

/s/ CLAUDE McCOLLOCH,

District Judge.

Dated at Portland, Oregon, this 8th day of March, 1943.

[Endorsed]: Filed March 8, 1943. [31]

Certified Securities, Inc.,
9 Ladd and Bush Building,
Salem, Oregon.

United States District Court
District of Oregon

\$10,703.62 Portland 7, Oregon, March 10, 1943

Received from G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, the sum of Ten Thousands Seven Hundred Three and 62/100 Dollars, on account of full settlement in Cause No. Civil 1789, United States vs. Certified Securities Inc., et al.

[Seal] CERTIFIED SECURITIES,
INC.

By E. K. PIASECKI
Pres.

[Endorsed]: Filed March 13, 1943. [32]

Oregon Mutual Life Insurance Company,
1029 S. W. Alder Street,
Portland, Oregon

United States District Court
District of Oregon

\$4,305.38 Portland 7, Oregon, March 10, 1943

Received from G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, the sum of Four Thousand Three Hundred Five and 38/100 Dollars, on account of full settlement in Cause No. Civil 1789, United States vs. Certified Securities, Inc., et al.

OREGON MUTUAL LIFE INS-
URANCE COMPANY

By D. P. STALNAKER
Vice President.

[Endorsed]: Filed March 13, 1943. [33]

[Title of District Court and Cause.]

MOTION FOR ORDER VACATING ORDER
FIXING VALUE AND DISBURSING
FUNDS AND FINAL JUDGMENT IN CON-
DEMNATION

Comes now plaintiff, United States of America, by and through its attorneys of record, and moves the above entitled Court for an Order vacating the Order fixing value and disbursing funds and final judgment in condemnation heretofore entered by this Court in this cause on the 8th day of March,

1943, upon the ground and for the reason that plaintiff believes it expedient to introduce further testimony in this cause relating to the fair market value of the property, including the merchantable timber thereon, taken in this proceeding.

/s/ HARRY D. BOIVIN

Special Attorney

Department of Justice

[Endorsed]: Filed Sept. 3, 1943. [34]

[Title of District Court and Cause.]

**ORDER VACATING ORDER FIXING VALUE
AND DISBURSING FUNDS AND FINAL
JUDGMENT IN CONDEMNATION**

This matter coming on for hearing upon Motion of the plaintiff, United States of America, by and through its attorneys of record, for an Order vacating the Order fixing value and disbursing funds and final judgment in condemnation, and It Appearing to the Court that plaintiff believes it expedient to introduce further testimony in this cause relating to the fair market value of the property, including merchantable timber thereon, taken in this proceeding; Now, Therefore, it is hereby Ordered that the Order fixing value and disbursing funds and final judgment in condemnation heretofore entered by this Court in this cause on the 8th day of March, 1943, be and the same is hereby set aside and vacated; and It Is Further Ordered that a

copy of this Order be served by mail on all of the **above named defendants** in this cause.

Dated at Portland, Oregon, this 3rd day of September, 1943.

/s/ CLAUDE McCOLLOCH

District Judge

[Endorsed]: Filed Sept. 3, 1943. [35]

[Title of District Court and Cause.]

ANSWER

Defendant, Certified Securities, Inc., an Oregon corporation, for its answer to plaintiff's complaint alleges:

I.

That at all the dates and times hereinafter mentioned, Certified Securities, Inc., was, and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

II.

That defendant, Certified Securities, Inc., an Oregon corporation, is the owner in fee simple of the following described real property, to-wit:

Tract No. A-2400: Beginning at the southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North 22° 57' West 39.93 chains to the place of beginning, containing 320 acres of land; more or

less, all in Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon.

III.

That the reasonable market value of said property at the time of the appropriation thereof by the plaintiff was and is the sum of \$25,000.00. [36]

IV.

That on or about the 1st day of September, 1942, plaintiff herein appropriated said real property described above for public use, to-wit: to the establishment of Camp Adair.

V.

That on account thereof these defendants have been, and are damaged in the sum of \$25,000.00. That on the 15th day of March, 1943, the plaintiff made payment to apply thereon in the sum of \$15,009.00, leaving an unpaid balance as of that date of \$9,991.00, with interest thereon at the rate of six per cent per annum from Aug. 17, 1942.

Wherefore: This answering defendant demands judgment in the sum of \$9,991.00, together with interest thereon at the rate of six per cent per annum from August 17, 1942 until paid; together with its costs and disbursements incurred herein; and that said judgment be entered and made a part

of the order and judgment of appropriation of the real property herein described.

W. C. WINSLOW

EDWARD K. PIASECKI

Attorney for Defendant

Certified Securities, Inc. [37]

State of Oregon,
County of Marion—ss.

I, Edward K. Piasecki being first duly sworn, say that I am the President of the defendant, Certified Securities, Inc., in the within entitled cause; and that the foregoing Answer therein is true as I verily believe.

EDWARD K. PIASECKI

Subscribed and sworn to before me this 8th day of November, A. D. 1943.

[Seal]

ROSE A. MORGALI

Notary Public for Oregon.

My commission expires May 14, 1945.

State of Oregon,
County of Marion—ss.

I, Edward K. Piasecki do hereby certify that I am one of the attorneys for defendant, Certified Securities, Inc., herein, that I served the within Answer upon John E. Walker, attorney for plaintiff, in Marion County, Oregon, on the 8th day of November, 1943, by placing a copy thereof, duly certified to be such by me as one of the attorneys for defendant, Certified Sec. in a sealed envelope, plainly addressed to John E. Walker, Esq., at Port-

land, Oregon, postage prepaid and deposited the same in the U. S. post office at Salem, Oregon, this 8th day of November, 1943.

EDWARD K. PIASECKI

One of the Attorneys for the Certified Securities,
Inc. [38]

State of Oregon,
County of Linn—ss.

I, do hereby admit due and legal service of the within answer in Linn County, Oregon, on this day of Nov., 1943, by receiving a true copy thereof duly certified to be such by Edward K. Piasecki, one of the attorneys for Def. Cert. Sec. Inc. I further certify that I am a resident and inhabitant of said County, and that I am one of the attorneys of record for the

One of the Attorneys for the Pltff.

[Endorsed]: Filed at Albany, Ore., Nov. 10, 1943.

[39]

[Title of District Court and Cause.]

REPLY

Comes now the petitioner United States of America and for a reply to the Answer of the defendant Certified Securities, Inc., to the Petition for Condemnation, admits, denies and alleges as follows:

I.

Replying to the allegations contained in paragraphs I and II of said Answer, the petitioner admits said allegations;

II.

Replying to the allegations contained in paragraph III of said Answer the petitioner denies that as of the date of the taking in this proceeding the reasonable and fair market value of the lands taken herein and described in the Petition for Condemnation was the sum of \$25,000.00 or any greater or lesser specific sum. The petitioner admits that said lands had some value as of the time of the taking herein but alleges that the amount of said value is unknown to the petitioner and is a matter to be determined by trial of this cause;

III.

Replying to the allegations contained in paragraph IV of said Answer the petitioner alleges that possession of the lands taken was granted to the petitioner by an Order of the above Court as of August 18, 1942.

IV.

Replying to the allegations contained in paragraph V of said Answer the petitioner denies that the answering defendants were damaged by the taking in this proceeding in the sum of \$25,000.00 or in any lesser or greater specific sum. The petitioner admits that the lands taken had some [40] value at the time of the taking and that the de-

fendants were damaged by the taking to the extent of that value but the petitioner alleges that the amount of said value and damage is unknown to the petitioner and is a matter to be determined by the trial of this cause.

Further replying to the allegations contained in said paragraph V the petitioner admits that disbursement of the sum of \$15,009.00 heretofore has been made in this proceeding but alleges that if the award of just compensation herein is less than said amount then the excess of said disbursement over the award of just compensation will be due and owing to the petitioner, United States of America with interest thereon.

/s/ STANLEY R. DARLING

Of Attorneys for Petitioner

State of Oregon,

County of Multnomah—ss.

I, Stanley R. Darling, being first duly sworn, depose and say:

That I am one of the attorneys for the petitioner in the above entitled cause and that I have made service of the foregoing Reply by delivering in person a duly certified copy thereof to W. C. Winslow, attorney of record for the defendant Certified Securities, Inc., on the 22nd day of May, 1944.

/s/ STANLEY R. DARLING

Subscribed and sworn to before me this 22nd day of May, 1944.

[Seal] /s/ L. JEANETTE BEAR
Notary Public for Oregon. My commission expires
9/23/47.

[Endorsed]: Filed May 22, 1944. [41]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury duly sworn and impaneled to try the above cause do hereby find that the full market value of the land acquired by the United States of America in this proceeding as of the date the United States took possession of said land, to-wit: August 18, 1942, was the sum of Fifteen Thousand Seven Hundred Dollars (\$15,700.00).

Dated at Portland, Oregon, this 26th day of May, 1944.

NORMAN J. HANKS
Foreman

[Endorsed]: Filed May 26, 1944. [42]

[Title of District Court and Cause.]

May 26, 1944

Now at this day comes the parties hereto by their counsel as of yesterday. Whereupon the jurors

impaneled herein being present, the trial of this cause is resumed. Thereafter, the said jury having heard the evidence adduced, the arguments of counsel and the instructions of the Court, retires in charge of a proper sworn officer to consider of its verdict. Thereafter, plaintiff being present by Mr. Stanley R. Darling, Special Attorney, Department of Justice, and the defendant Certified Securities, Inc., by Mr. W. C. Winslow, of counsel, said jury comes into court and returns its verdict in words and figures as follows, to-wit:

“We, the Jury duly sworn and impaneled to try the above cause do hereby find that the full market value of the land acquired by the United States of America in this proceeding as of the date the United States took possession of said land, to-wit: August 18, 1942, was the sum of Fifteen Thousand Seven Hundred Dollars (\$15,700.00).

Dated at Portland, Oregon, this 26th day of May, 1944.

NORMAN J. HANKS

Foreman”

which verdict is received by the Court and ordered to be filed and by direction of the Court judgment is entered thereon, and the same is recorded in the Civil Order Book. [43]

In the District Court of the United States
For the District of Oregon

Civil No. 1789

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CERTIFIED SECURITIES, INC., an Oregon
corporation; ERNEST SCHULD; OREGON
MUTUAL LIFE INSURANCE COMPANY,
an Oregon corporation; POLK COUNTY, a
municipal corporation and political subdivision
of the State of Oregon,
Defendants.

JUDGMENT ON VERDICT

This cause coming on regularly for trial, plaintiff appearing by and through Stanley R. Darling, Special Attorney for the Department of Justice, and the defendant Certified Securities, Inc., appearing by and through W. C. Winslow and Edward K. Piasecki, its attorneys, a jury was impaneled and sworn to try the issues in said cause, and upon the order of the Court, the jury viewed the real property sought to be acquired by the United States by and through this proceeding, and after hearing the testimony of witnesses for the plaintiff and for the defendants, argument of counsel, and the instructions of the Court, did retire for deliberation and after deliberating, did on the 26th day of May, 1944, return into this Court a verdict in words and figures as follows, to-wit:

In the District Court of the United States
For the District of Oregon

Civil No. 1789

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTIFIED SECURITIES, INC., an Oregon
corporation; ERNEST SCHULD; OREGON
MUTUAL LIFE INSURANCE COMPANY,
an Oregon corporation; POLK COUNTY, a
municipal corporation and political subdivision
of the State of Oregon,

Defendants.

VERDICT OF THE JURY [44]

We, the Jury duly sworn and impaneled to try
the above cause do hereby find that the full market
value of the land acquired by the United States of
America in this proceeding as of the date the
United States took possession of said land, to-wit:
August 18, 1942, was the sum of Fifteen Thousand
Seven Hundred Dollars (\$15,700.00).

Dated at Portland, Oregon, this 26th day of
May, 1944.

/s/ NORMAN J. HANKS

Foreman

And It Appearing to the Court that heretofore
on the 4th day of February 1943, there was filed
in this cause a Declaration of Taking, and simul-

taneously therewith the United States of America paid into the Registry of this Court the sum of \$15,009.00 for the use and benefit of the persons entitled thereto; Now, Therefore, by virtue of the law and by reason of the premises and the verdict, it is hereby Ordered and Adjudged that the full fair market value of the hereinafter described real property sought to be acquired by the United States of America by and through this proceeding be and the same is hereby fixed in the sum of \$15,700.00 as of the 18th day of August, 1942, and It Is Further Ordered and Adjudged that upon the payment into the Registry of this Court of the further sum of \$691.00 together with interest at the rate of six per cent per annum on the total award of \$15,700.00 from the 18th day of August, 1942 to the 4th day of February 1943, the date of the filing of the Declaration of Taking, and interest at the rate of six per cent per annum on the deficiency award of \$691.00 from the 4th day of February, 1943 to the date of the deposit of said deficiency award into the Registry of this Court, judgment and decree of this Court shall be entered herein appropriating and condemning for the use and purposes of the United States of America, as set forth in said Declaration of Taking and Petition for Condemnation on file herein, the full fee simple title, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, in and to the following described lands in Polk County, Oregon: [45]

Tract No. A-240: Beginning at the Southeast corner of the Julia Ann Jones Donation Land Claim No. 52; running thence West 79.66 chains; thence South 36.75 chains; thence East 95.46 chains; thence North 22° 57' West 39.93 chains to the place of beginning, containing 320 acres of land; more or less, all in Polk County, Oregon, said land above described being the North one-half of the Donation Land Claim of Jonathan Liggett and wife, and more particularly described as Claims No. 39 and No. 53, Notification No. 2697, Township 9 South, Ranges 5 and 6 West of the Willamette Meridian in Polk County, Oregon.

JAMES ALGER FEE

District Judge

Dated at Portland, Oregon, this 26th day of May, 1944.

[Endorsed]: Filed June 7, 1944. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment on Verdict entered May 26, 1944, and filed June 7, 1944.

Dated at Portland, Oregon, August 23rd, 1944.

/s/ ERNEST FALK

Special Attorney

Department of Justice

/s/ BERT C. BOYLAN

Special Attorney

Department of Justice

/s/ LINUS M. FULLER

Special Attorney

Department of Justice

[Endorsed]: Filed Aug. 23, 1944. [47]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED ON APPEAL

The appellant, the United States of America, will rely upon the following points in the prosecution of its appeal from the Judgment of the United States District Court for the District of Oregon:

1. The District Court was without jurisdiction to enter the Order of September 3, 1943 vacating the Order of March 8, 1943, Fixing Value, Disbursing Funds and Final Judgment in Condemnation.

2. The District Court was without jurisdiction to enter the Judgment of May 26, 1944, Fixing Value in the sum of \$15,700.00.

3. The Order of the District Court of March 8, 1943, Fixing Value, Disbursing Funds and Final Judgment in Condemnation should be reinstated.

Dated at Portland, Oregon, this 15th day of March, 1945.

/s/ CARL C. DONAUGH

United States Attorney

/s/ BERT C. BOYLAN

Special Assistant to the

United States Attorney

United States of America

District of Oregon

County of Multnomah—ss.

I, Bert C. Boylan, Special Assistant to the United States Attorney for the District of Oregon, hereby certify that on the 15th day of March, 1945, I made service of the within Appellant's Statement of Points To Be Urged on Appeal on the appellee herein, Certified Securities, Inc., by depositing in the United States Postoffice at Portland, Oregon, a duly certified copy thereof enclosed in an envelope with postage fully prepaid thereon addressed to W. C. Winslow, 403 Masonic Temple Building, Salem, Oregon, of attorneys for the Certified Securities, Inc.

/s/ BERT C. BOYLAN

[Endorsed]: Filed 3/15/45. [48]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD

To: The Clerk of the District Court of the United States for the District of Oregon:

Comes now the United States of America, the appellant herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designates the following portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause:

1. Petition for Condemnation filed February 4, 1943.
2. Declaration of Taking filed February 4, 1943.
3. Judgment on the Declaration of Taking entered February 4, 1943.
4. Answer of Polk County, Oregon filed February 18, 1943.
5. Answer of Oregon Mutual Life Insurance Company, a corporation, filed February 18, 1943.
6. Petition of Certified Securities, Inc. and Ernest Schuld for an Order Fixing Value and Disbursing Funds on Deposit filed March 8, 1943.
7. Order Fixing Value, Disbursing Funds on Deposit and Final Judgment in Condemnation entered March 8, 1943.
8. Receipt of Certified Securities, Inc. for \$10,703.62 filed March 13, 1943.
9. Receipt of Oregon Mutual Life Insurance Company, a corporation, for \$4,305.38 filed March 13, 1943.

10. Motion for an Order Vacating Order Fixing Value, Disbursing Funds and Final Judgment in Condemnation filed September 3, 1943. [49]

11. Order Vacating Order Fixing Value, Disbursing Funds and Final Judgment in Condemnation entered September 3, 1943.

12. Answer of Certified Securities, Inc. filed November 10, 1943.

13. Reply filed May 22, 1944.

14. Verdict of the Jury filed May 26, 1944.

15. Judgment on the Verdict entered May 26, 1944.

16. Judgment on the Verdict filed June 7, 1944.

17. Notice of Appeal by Plaintiff dated and filed August 23, 1944.

18. Statement of Points Upon Which Appellant Intends to Rely on the Appeal filed March 15, 1945.

19. Designation of Contents of Record on Appeal filed March 15, 1945.

Dated at Portland, Oregon, this 15th day of March, 1945.

/s/ CARL C. DONAUGH

United States Attorney for
the District of Oregon

/s/ BERT C. BOYLAN

Special Assistant to the
United States Attorney

United States of America
District of Oregon
County of Multnomah—ss.

I, Bert C. Boylan, Special Assistant to the

United States Attorney for the District of Oregon, hereby certify that on the 15th day of March, 1945, I made service of the within Designation of Contents of Record on appeal on the appellee herein, Certified Securities, Inc., by depositing in the United States Postoffice at Portland, Oregon, a duly certified copy thereof enclosed in an envelope with postage fully prepaid thereon addressed to W. C. Winslow, 403 Masonic Temple Building, Salem, Oregon, of attorneys for the Certified Securities, Inc.

/s/ BERT C. BOYLAN

[Endorsed]: Filed March 15, 1945. [50]

United States of America
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 52 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1789, in which United States of America is Petitioner and Appellant, and Certified Securities, Inc., an Oregon corporation; Ernest Schuld; Oregon Mutual Life Insurance Company, an Oregon corporation; Polk County, a municipal corporation and political subdivision of the State of Oregon are Defendants and

Appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 19th day of March, 1945.

[Seal]

LOWELL MUNDORFF

Clerk

By F. L. BUCK

Chief Deputy [52]

[Endorsed]: No. 11012, United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Certified Securities, Inc, an Oregon Corporation, Appellee.

Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 21, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11012

UNITED STATES OF AMERICA,

Appellant

v.

CERTIFIED SECURITIES, INC., an Oregon
corporation; ERNEST SCHULD; OREGON
MUTUAL LIFE INSURANCE COMPANY,
an Oregon corporation; POLK COUNTY, a
municipal corporation and political subdivision
of the State of Oregon,

Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE URGED ON APPEAL

The appellant, the United States of America, will
rely upon the following points in the prosecution
of its appeal from the Judgment of the United
States District Court for the District of Oregon:

1. The District Court was without jurisdiction
to enter the Order of September 3, 1943 vacating
the Order of March 8, 1943, Fixing Value, Dis-
bursing Funds and Final Judgment in Condemna-
tion.

2. The District Court was without jurisdiction
to enter the Judgment of May 26, 1944, Fixing
Value in the sum of \$15,700.00.

3. The Order of the District Court of March 8,
1943, Fixing Value, Disbursing Funds and Final
Judgment in Condemnation should be reinstated.

Dated at Portland, Oregon, this 11th day of May, 1945.

CARL C. DONAUGH

United States Attorney

BERT C. BOYLAN

Special Assistant to the

United States Attorney

United States of America

District of Oregon

County of Multnomah—ss.

I, Bert C. Boylan, Special Assistant to the United States Attorney for the District of Oregon, hereby certify that on the 11th day of May, 1945, I made service of the within Appellant's Statement of Points To Be Urged on Appeal on the appellee herein, Certified Securities, Inc., by depositing in the United States Postoffice at Portland, Oregon, a duly certified copy thereof enclosed in an envelope with postage fully prepaid thereon addressed to W. C. Winslow, 403 Masonic Temple Building, Salem, Oregon, of attorneys for the Certified Securities, Inc.

BERT C. BOYLAN

[Endorsed]: Filed May 14, 1945. Paul P. O'Brien, Clerk.

No. 11012

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**CERTIFIED SECURITIES, INC., AN OREGON CORPORATION,
APPELLEE**

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON**

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,

Acting Head, Lands Division, Department of Justice.

ROGER P. MARQUIS,

FRED W. SMITH,

Attorneys, Department of Justice,

Washington, D. C.

FILED

JUL 23 1945

**PAUL P. O'BRIEN,
CLERK**

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11012

UNITED STATES OF AMERICA, APPELLANT

v.

CERTIFIED SECURITIES, INC., AN OREGON CORPORATION,
APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment dated May 26, 1944, and filed on June 7, 1944 (R. 57-60). Notice of appeal was filed August 23, 1944 (R. 60-61). The jurisdiction of the district court was invoked under the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, and related statutes (R. 2-3). The jurisdiction of this court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the trial court on September 3, 1943, had jurisdiction to vacate a prior judgment of March 8, 1943, the term of court at which such judgment was entered having then expired.

STATEMENT

The United States on June 18, 1942, instituted condemnation proceedings under the Second War Powers Act to acquire 25,500 acres of land in Polk County, Oregon, for the establishment of Camp Adair (Civil No. 1304). Included in the proceeding was Tract A-240 containing 320 acres, owned by appellee Certified Securities, Inc. An order granting the Government possession of this tract was entered by the court on the same day the proceeding was instituted (cf. R. 6, 14).

On February 4, 1943, in conformity with what the federal district judges in Oregon deem to be the requirements of Oregon law, the Government filed a separate condemnation petition (Civil No. 1789) covering Tract A-240 (R. 2-8). A declaration of taking was filed on the same day, and there was deposited in the registry of the court as estimated just compensation the sum of \$15,009.00 (R. 8-12). Judgment on the declaration of taking was entered on that date (R. 13-15).

On March 8, 1943, there was filed a "Petition For Order Fixing Value and Disbursing Funds on Deposit," executed by appellee, in which it was alleged that "reasonable and just compensation for the taking of said lands [Tract A-240] was and is the sum of

\$15,009.00''; appellee in said petition further "agreed that said sum of \$15,009.00 was and is the fair market value of the hereinbefore described lands at the time of taking" and that "said sum may be fixed by this Court as the reasonable and just compensation * * * and * * * as the full, final and complete award for the taking of said lands" (R. 38).¹

On the same day, on motion of the United States, the court entered its judgment decreeing the fair market value of the lands to be \$15,009.00, and ordering disbursement of the fund as prayed for in appellee's petition, which disbursement was made (R. 40-47).

Judgments were entered in a similar manner in a number of other tracts in the Camp Adair project. The trial court having later indicated its suspicion that the awards so made were excessive and irregular, the Government on September 3, 1943, filed in the instant case a motion to vacate the order of March 8, 1943, on the ground that it was believed "expedient to introduce further testimony in this cause relating to the fair market value of the property"² (R. 47-

¹ In this petition appellee agreed that the Oregon Mutual Life Insurance Company should be paid \$4,248.15 and interest in discharge of a mortgage it held on the tract (R. 37). As the total fund was more than sufficient to pay the mortgage, the Insurance Company had no interest in valuation of the property. Cf. *Silberman v. United States*, 131 F. 2d 715 (C. C. A. 1, 1942).

² Identical motions were made and granted in all the other cases in which judgments by agreement had been entered. Two of such cases were recently before this Court on the appeal of the land-owners from subsequent judgments in lesser amounts. *E. C. Sherlin Co. v. United States* (No. 10802), 146 F. 2d 613 (C. C. A. 9, 1944), and *Clair v. United States* (No. 10805), 146 F. 2d 617 (C. C. A. 9, 1944), the material facts of which cases are in all re-

48). On that day the trial court entered an order setting aside the prior order fixing value (R. 48-49). Thereafter, appellee filed an answer in which it claimed to be entitled to the sum of \$25,000.00 for the taking (R. 49-51). The issue of value was later tried to a jury, which returned a verdict in the sum of \$15,700.00, upon which the court rendered judgment on May 26, 1944, the same being filed June 7, 1944 (R. 55-56, 57-60). Since the power of the court to vacate the first judgments was being challenged on appeal by the landowners in the *Shevlin* and *Clair* cases the Government filed a notice of appeal from the final judgment in the instant case (R. 60-61).

ARGUMENT

The order of September 3, 1943, vacating the order entered March 8, 1943, and the judgment subsequently entered on June 7, 1944, are invalid

As already noted, this is one of a series of cases involving different tracts condemned for the Camp Adair project. The material facts of the instant case are identical with those before this Court in the cases of *E. C. Shevlin Co. v. United States*, 146 F. 2d 613 (C. C. A. 9, 1944) and *Clair v. United States*, 146 F. 2d 617 (C. C. A. 9, 1944). There this Court held that the action of the trial court in setting aside its prior judgments was invalid, reversed the later judgments entered and reinstated the first judgments. That

spects identical with those of the instant case. The history of this series of cases, including the circumstances which prompted the Government to file the motions to vacate, is not fully set out here, but may be found at pages 3 to 9 of the Government's brief in the *Shevlin* case, No. 10802.

result was based, among other things, on the holding that the trial court had lost jurisdiction to set aside its earlier judgments because of the expiration of the term at which such judgments were entered. In the decision in the *Shevlin* case, after noting that the term of court during which the first judgment was entered had expired on July 4, 1943, the Court stated (146 F. 2d 616): "We also agree with appellant's contention stated as fourth above, that even if the order [vacating the first judgment] were otherwise valid the court had no power to make it after the expiration of the term of the District Court."

In the instant case the first judgment fixing value was entered on March 8, 1943 (R. 40-46), during a term of court which expired July 4, 1943 (28 U. S. C., sec. 183). Therefore, on the authority of the decisions in the *Shevlin* and *Clair* cases, *supra*, the order of September 3, 1943, vacating the judgment of March 8, 1943, was void for lack of jurisdiction of the court to make it, and the subsequent judgment of June 7, 1944, should be reversed and the first judgment of March 8, 1943, reinstated.

Appellee may contend that the Government, by reason of having filed the motion to vacate, is estopped to challenge the validity of the order vacating the judgment of March 8, 1943. The principle is recognized that where a party requests the court to rule in a given way on a matter *which the court has jurisdiction to decide*, and the court rules as requested, such party may be estopped to assert on appeal that the court ruled erroneously. Cf. *United States v. Wurtsbaugh*,

140 F. 2d. 534 (C. C. A. 5, 1944). But under the circumstances of the instant case, this Court has held in the *Shevlin* and *Clair* cases that when the term ended the judicial power of the court below was exhausted. That being so, the court lacked jurisdiction of the subject matter of the action when, on September 3, 1943, the motion to vacate was filed and the order vacating the prior judgment was entered. This Court in those cases necessarily held that jurisdiction of the subject matter could not be revived in the court after term time by the action of the United States in filing the motion to vacate, and that the order vacating the prior judgment was a nullity. In such a case the controlling principle is that such an order may be challenged, either by direct appeal or collaterally. *Grubb v. Public Utilities Commission*, 281 U. S. 470, 475 (1929); *Fraenkl v. Cerecedo*, 216 U. S. 295, 303 (1910); *Gainesville v. Brown-Crummer Co.*, 277 U. S. 54, 59 (1928). In *Grubb v. Public Utilities Commission*, *supra*, the rule was stated as follows at 281 U. S. 475:

* * * That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this *although at the outset he treated that jurisdiction as subsisting and invoked its exercise*. Of course, he is entitled to raise this question *notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent*. We turn therefore to the grounds on which that jurisdiction is questioned.³

³ Italics supplied.

The United States therefore can challenge the validity of the order vacating the judgment of March 8, 1943.

CONCLUSION

For the reasons hereinbefore stated, the judgment of June 7, 1944, should be reversed, and the judgment of March 8, 1943, should be reinstated.

J. EDWARD WILLIAMS,
Acting Head, Lands Division,
Department of Justice.

ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys, Department of Justice,
Washington, D. C.

JULY 1945.

United States Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

vs.

CERTIFIED SECURITIES, INC., an Oregon
Corporation, Appellee,

and

ERNEST SCHULD; OREGON MUTUAL LIFE
INSURANCE COMPANY, an Oregon cor-
poration; POLK COUNTY, a municipal cor-
poration and political subdivision of the State
of Oregon Defendants.

APPELLEE'S BRIEF

Appeal from the Judgment of the United States
District Court, for the District of Oregon.

HONORABLE JAMES ALGER FEE, Judge

W. C. WINSLOW, Attorney for Appellee,
Salem, Oregon

FILED

1945

PAUL P. O'BRIEN,

United States Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

vs.

CERTIFIED SECURITIES, INC., an Oregon
Corporation, Appellee,

and

ERNEST SCHULD; OREGON MUTUAL LIFE
INSURANCE COMPANY, an Oregon cor-
poration; POLK COUNTY, a municipal cor-
poration and political subdivision of the State
of Oregon, Defendants.

APPELLEE'S BRIEF

Appeal from the Judgment of the United States
District Court, for the District of Oregon.

HONORABLE JAMES ALGER FEE, Judge

W. C. WINSLOW, Attorney for Appellee,
Salem, Oregon

STATEMENT

A very brief statement will suffice. This involves a condemnation proceeding covering real property in the Camp Adair project. Appellee was the owner of the real property involved. By stipulation, a judgment was entered fixing the amount of damages sustained on account of the taking of the property by the appellant. This was entered March 8, 1943.

The money was paid into court and distributed in accordance with this determination, \$10,703.62 of the amount being paid to appellee and the balance to the Oregon Mutual Life Insurance Company on account of a mortgage.

Thereafter and on September 3, 1943, the Court, on the motion of appellant, set aside the judgment determining the damages sustained by appellee on account of the taking of this property. As the record shows, this motion was not served upon appellee. No notice was given to appellee of the hearing. Thereafter appellee was required to file his answer and go to trial, at which trial the jury returned a verdict for \$15,700. Judgment was entered on this verdict on May 26, 1944.

While this appeal on the part of the government purports to be an appeal from that judgment, there is no contention that the Court committed any error at the trial which resulted in the entry of this judgment. The real contention urged by the government is that it should not have had the former judgment set aside. It is now contending that the subsequent judgment should be reversed because of the error of the Court in setting this former judgment aside on its motion.

It will be appellee's position that the government is estopped from taking this position. It is the contention of appellee that the situation is vastly different here, with the government as the appellant, from that which it would be if the situation were reversed.

PROPOSITION NO. 1

Appellee contends that the appellant is estopped from urging the questions which it is attempting to urge in this case, because of the following facts:

(a) The original judgment herein, and which was set aside September 3, 1943, was set aside on the motion of the appellant.

(b) After said former judgment had been set aside, the appellant herein acquiesced in this ruling of the Court and had said cause set down and tried before the Court and a jury, resulting in the second judgment.

(c) The condition of the record in this case was invited by appellant.

(d) The condition of the record in this case was induced by appellant.

(e) The position of appellant herein in this appeal is entirely inconsistent with that previously assumed by appellant at the time said first judgment was set aside and said cause set down and re-tried and the second judgment obtained.

POINTS AND AUTHORITIES

Although there are exceptional cases, the general rule is that a plaintiff or defendant cannot appeal or prosecute a writ of error from a judgment, order, or decree in his own favor.

3 C.J. 635 and cases cited in note 40.

A party may not only waive his right to appeal or maintain proceedings in error by express agree-

ment or stipulation, but a waiver may also be implied from, or may estopped by, an act or agreement which is inconsistent with such right.

3 C.J. 664 and cases cited in note 10.

If a person voluntarily acquiesces in, or recognizes the validity of, a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court.

3 C.J. 665 and cases cited in note 16.

An appellant or plaintiff in error will not be permitted to take advantage of errors which he himself committed, or invited or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct.

5 C.J.S. 173 and cases cited in notes 58, 59, 60, and 61, and in note 25 on page 226.

Where one has assented to or recognized the validity of matters or proceedings not constituting fundamental error, he may not complain thereof in review.

5 C.J.S. 227 and cases cited in note 29.

ARGUMENT

We think that the matters involved here are so clear and the law with reference thereto so well settled that any argument we should make would be entirely superfluous and a waste of good printers' ink. We, therefore, submit that, while, as held by this Court in the cases of *Clair v. U.S.*, 146 Fed. (2) 617, and *Shevlin v. U.S.*, 146 Fed. (2) 613 and 617, the order setting aside the first judgment herein was and is void, nevertheless appellant herein is estopped by its own acts and conduct from now attempting to take advantage of its own wrong.

Respectfully submitted,
W. C. WINSLOW
Attorney for Appellee,
Salem, Oregon

No. 11013

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

L. G. TRULLINGER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUL 2 1945

PAUL P O'BRIEN,
CLERK

No. 11013

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

L. G. TRULLINGER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	18
Designation of Record on (CCA).....	142
Designation of Record on (DC).....	14
Notice of	13
Order re Printing of Exhibits on (CCA)..	143
Order re Transmittal of Exhibits on (DC)	15
Statement of Points on	140
Certificate of Clerk to Transcript of Record on Appeal	18
Complaint	2
Designation of Record on Appeal (CCA).....	142
Designation of Record on Appeal (DC).....	14
Findings of Fact and Conclusions of Law....	10
Judgment	12
Names and Addresses of Attorneys of Record	1
Notice of Appeal	13
Order Amending Title	6
Orders Extending Time	16, 17

Order re Printing of Exhibits on Appeal (CCA)	143
Stipulation Thereto	143
Order re Transmittal of Exhibits on Appeal (DC)	15
Pre-Trial Order	6
Pre-Trial Proceedings	19
Reporter's Certificate Thereto	23
Statement of Points on Appeal	140
Trial Proceedings	24
Witness for Defendant:	
Trullinger, L. G.	
—direct	78
—cross	90
Exhibit for Plaintiff:	
1—Bill of Sale	75
Witnesses for Plaintiff:	
Gilmore, Earl	
—direct	28
—cross	42
—rebuttal, direct	94
—cross	96
McQuiston, Claude Byron	
—direct	48
—cross	56
—redirect	66

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

McDANNELL BROWN, F. E. WAGNER and
ADAMS F. JOY,

Bedell Building, Portland, Oregon,

for Appellant.

NICHOLAS JAUREGUY, CAKE, JAUREGUY
and TOOZE,

Yeon Building, Portland, Oregon,

for Appellee.

In the District Court of the United States
for the District of Oregon

No. Civil 2403

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

L. G. TRULLINGER,

Defendant.

COMPLAINT

Plaintiff, for a cause of action against defendant,
complains and alleges that:

I.

Plaintiff, as Administrator of said Office of Price Administration, brings this action against defendant for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942, as amended, (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23, 50 U.S.C.A., Appendix 925/e/) hereinafter called the "Act".

II.

Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

III.

During the times herein mentioned there has been in effect pursuant to the Act, Maximum Price Reg-

ulation No. 136, as amended, establishing maximum prices for sales of tractors and other like equipment.

IV.

On or about the 7th day of April, 1943, defendant sold a certain tractor at a price higher than the maximum price provided for by said Maximum Price Regulation No. 136.

V.

The transaction referred to in Paragraph IV occurred within one year immediately preceding the filing of this complaint and said sale was not [1*] made for use or consumption other than in the course of trade or business.

VI.

Three times the aggregate amount by which the price charged by said defendant in the transaction herein referred to exceeded the maximum price as provided by said Maximum Price Regulation No. 136, as amended, equals the sum of Two Thousand Three Hundred Ninety-four Dollars (\$2394.00).

Wherefore, Administrator prays judgment on behalf of the United States of America against defendant in the sum of Two Thousand Three Hundred Ninety-four Dollars (\$2394.00), for plaintiff's costs and disbursements incurred in the prosecu-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tion of this action and for such other and further relief as to the Court may seem proper.

/s/ McDANNELL BROWN

/s/ F. E. WAGNER

Attorneys for Plaintiff

[Endorsed]: Filed March 24, 1944. [2]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL ANSWER

Comes Now the defendant whose true name is L. G. Trullinger and for his amended and supplemental answer to plaintiff's complaint, admits, denies and alleges:

I.

Defendant admits that this is an action for treble damages which plaintiff purports to bring under Section 205(e) of the Emergency Price Control Act of 1942, and denies the remaining allegations of paragraph I.

II.

Defendant admits the allegations of paragraph II.

III.

Answering paragraph III of said complaint defendant admits that at the times mentioned in the complaint there has been in effect a regulation known as Maximum Price Regulation No. 136, which has been amended from time to time, establishing maximum prices for certain types of machinery, and defendant denies the remaining allegations of paragraph III.

IV.

Answering the allegations of paragraphs IV, V, and VI, of said complaint, defendant admits that about the time stated in paragraph IV, defendant sold a tractor, and denies the remaining allegations of said paragraphs IV, V, and VI and the whole thereof. [3]

Further answering plaintiff's complaint defendant alleges that said sale was made in good faith and that if in said sale there was any violation of the Emergency Price Control Act of 1942 said violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

Wherefore, defendant having fully answered plaintiff's complaint, prays that plaintiff recover nothing, that said complaint be dismissed and that the defendant recover his costs and disbursements.

NICHOLAS JAUREGUY

CAKE, JAUREGUY & TOOZE

Attorneys for Defendant.

Due and legal service of the within Amended Answer by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 31st day of October, 1944.

/s/ ADAMS F. JOY

Of Attorneys for Plaintiff

[Endorsed]: Filed October 31, 1944. [4]

[Title of District Court and Cause.]

ORDER AMENDING TITLE

It having been stipulated in writing between the plaintiff and defendant, through their respective attorneys, that the designation of the defendant of the above entitled action be changed from L. B. Trullinger to L. G. Trullinger, the true and correct name of the defendant, now, therefore, it is

ORDERED

That the title in the above entitled action be corrected by changing the name and designation of the defendant to L. G. Trullinger, same being the true and correct name of the defendant in said action and all files and records in the said action are hereby corrected accordingly.

Dated this 6th day of November, 1944.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 8, 1944. [5]

[Title of District Court and Cause.]

PRETRIAL ORDER

A pretrial proceeding in the above entitled cause was held at Portland, Oregon, on the 16th day of October, 1944, before the undersigned, one of the judges of the above entitled court, and under the

direction of the court. At said pretrial proceeding the following proceedings were had to-wit:

I.

ADMITTED FACTS

(a) It is admitted in this case that this action is brought under Section 205(e) of the Emergency Price Control Act of 1942 (although defendant does not admit that plaintiff has the right to bring this action), and it is admitted that jurisdiction of this action is conferred upon the court by Section 205(c) of said act.

(b) It is also admitted that on the 7th day of April, 1943, there was in effect, pursuant to said act, maximum price regulation No. 136 as amended establishing maximum prices for certain types of tractors and other types of machinery.

(c) It is admitted that on or about the 7th day of April, 1943, the defendant sold a certain tractor to one Earl Gilmore. It is also admitted that the defendant received from the purchaser of said tractor the sum of \$2,800.00 (defendant claiming that said sum included the purchase price of other articles of personal property). [6]

II.

ISSUES IN CONTROVERSY

The following issues are in controversy in this case:

(a) The plaintiff contends, but the defendant denies, that the particular tractor and other articles

of personal property which defendant claims he sold, were covered by said maximum price regulation No. 136.

(b) The plaintiff contends, but defendant denies, that the tractor was sold at a price higher than the maximum price provided for by said maximum price regulation No. 136. Plaintiff contends, that the correct ceiling price covering this sale was \$2002.00.

(c) The plaintiff contends, but defendant denies, that said sale was made for use or consumption in the course of trade or business. In this connection, defendant contends that said sale was for the personal use of the purchaser thereof, and that such personal use does not constitute use in the course of trade or business.

(d) In the event the court finds that said sale was covered by said maximum price regulation No. 136, and that plaintiff has the right to bring this action and that the price at which defendant sold said tractor was higher than the maximum price provided by said regulation, the next issue presented is: What was the amount of said excess?

(e) In the event it is found that defendant violated said maximum price regulation and that plaintiff has the right to bring this action, it is contended by defendant, but denied by plaintiff, that said sale was made in good faith and that said violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation.

III.

EXHIBITS

The following exhibits have been produced by the respective parties, in each case exhibited to the adverse party, but with the permission of the court have not yet been marked as pretrial exhibits.

(a) Plaintiff produced as a pretrial exhibit "Collation No. 1, Office of Price Administration, Part 1390—Machinery and Transportation equipment—Maximum Price Regulation No. 136 as amended—Machines and Parts, and Machinery Services", and copy of bill of sale from L. B. Trullinger to Earl Gilmore and with consent of defendant reserves right to produce original at trial.

(b) Defendant produced and exhibited to plaintiff two bundles of bills, invoices and similar documents covering repair parts.

The foregoing consists of the matters agreed upon at said pretrial conference and of the issues in controversy and said issues are to be tried and determined by the court in the above entitled action, and both parties have waived trial by jury.

The above entitled cause is hereby set for trial before the court without a jury for Tuesday, November 14, 1944, at 10:00 o'clock A.M.

Dated this 13th day of November, 1944.

CLAUDE McCOLLOCH

Judge

Approved:

/s/ ADAMS F. JOY

Of Attorneys for Plaintiff

/s/ NICHOLAS JAUREGUY

Of Attorneys for Defendant

[Endorsed]: Filed November 13, 1944. [8]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action was tried by the court without a jury, a jury having been waived, on the 13th day of November, 1944, starting at 1:30 P.M. Plaintiff appeared by his attorneys F. E. Wagner, Adams F. Joy and James A. Little, and defendant appeared in person and by his attorney, Nicholas Jaureguy (of Cake, Jaureguy & Tooze). Evidence was introduced on behalf of each of the parties and after having considered said evidence and the arguments of counsel, the court does now make and enter the following

FINDINGS OF FACT

I.

Jurisdiction of this action is conferred upon the court by Section 205 (c) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix Sec. 925 (c) and plaintiff contends that he has the right to bring this action pursuant to the provisions of Sec. 205 (e) of said act for an alleged

violation by defendant of said act, in that plaintiff contends that defendant on or about the 7th day of April, 1943, sold a certain tractor at a price higher than the maximum price which plaintiff contends is provided by Maximum Price Regulation No. 136.

II.

On or about the 7th day of April, 1943, defendant sold a certain tractor for the sum of \$2,800.00. On said date there was in effect, pursuant to said Act, Maximum Price Regulation No. 136 as amended establishing maximum prices for certain types of tractors and other types of machinery. [9]

III.

The said sales price of \$2,800.00 for said tractor was in excess of the maximum price provided therefor by said Maximum Price Regulation No. 136 in the approximate amount of \$462.50.

IV.

The sale of said tractor was to one Earl Gilmore and said Gilmore was the ultimate consumer and said sale was made to him for use or consumption not in the course of trade or business within the meaning of the Emergency Price Control Act.

Based upon said above Findings of Fact the court makes the following

CONCLUSION OF LAW

I.

In said sale by defendant there was no violation by him of Maximum Price Regulation No. 136.

II.

Any right of action in connection with said sale is in said purchaser, Earl Gilmore, and not in plaintiff herein.

III.

Defendant is entitled to a judgment that plaintiff recover nothing and that his complaint be dismissed, and the court directs the entry of such judgment.

Dated this 6th day of December, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed December 6, 1944. [10]

In the District Court of the United States
for the District of Oregon

Civil No. 2403

CHESTER BOWLES, Administrator of the Office
of Price Administration,

Plaintiff,

vs.

L. G. TRULLINGER,

Defendant.

JUDGMENT

The above entitled action having heretofore been tried before the Court without a jury, and the Court having heretofore entered its Findings of Fact and Conclusions of Law;

Now, Therefore, based upon said Findings of Fact and Conclusions of Law

It is hereby Ordered and Adjudged that the plaintiff recover nothing and that his complaint be and the same is hereby dismissed.

Dated this 6th day of December, 1944.

CLAUDE McCOLLOCH

Judge.

Due and legal service of the within proposed Judgment, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of November, 1944.

F. E. WAGNER

Of Attorneys for Plaintiff

EA

[Endorsed]: Filed December 6, 1944. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To L. G. Trullinger, Defendant Above Named and
to Cake, Jaureguy and Tooze, His Attorneys.

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment dismissing said action made and

entered in the above entitled action on the 6th day of December, 1944.

Dated at Portland, Oregon, this 23rd day of December, 1944.

(Signed) F. E. WAGNER

(Signed) W. DUNLAP CANNON, Jr.

Attorneys for Appellant

Chester Bowles, Administrator

[Endorsed]: Filed December 28, 1944. [12]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Comes now the plaintiff above named and as appellant in the above entitled action submits the following as his Designation of Record on the appeal of said matter to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Plaintiff's Complaint
2. Defendant's Amended Supplemental Answer
3. Order Amending Title
4. Pre-Trial Order
5. Findings of Fact and Conclusions of Law
6. Judgment
7. Transcript of Proceedings of Pre-Trial Conference, Oct. 2, 1944.
8. Transcript of Trial Proceedings, November 13, 1944

9. Order to send all exhibits including Plaintiff's and Defendant's exhibits introduced in evidence, Nos. 1 to 3 inclusive.

10. Notice of Appeal

11. Order Extending Time to lodge record in Circuit Court of Appeals

12. This Designation of Record

Dated at Portland, Oregon, this 14th day of March, 1945.

/s/ F. E. WAGNER

Of Attorneys for Appellant

[13]

State of Oregon

County of Multnomah—ss.

Due and legal service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County, Oregon, this 14th day of March, 1945, by receipt of a certified copy thereof.

/s/ NICHOLAS JUAREGUY

Of Attorneys for Defendant

[Endorsed]: Filed March 14, 1945. [14]

[Title of District Court and Cause.]

ORDER

It appearing necessary that the original exhibits in the above described case accompany the transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this court send the original exhibits numbered 1, 2 and 3 filed in this case, to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 19th day of March, 1945.

CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed March 19, 1945. [15]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter came on to be heard upon application of the plaintiff for an order extending the time within which to file its record on appeal and it appearing to the Court that plaintiff's Notice of Appeal was dated December 23, 1944, and was filed December 28, 1944, and it further appearing to the Court that said application for extension of time should be allowed, it is

Ordered that the time within which plaintiff has to file its record on appeal in the above entitled action be and the same hereby is extended for a period of thirty days from the 3rd day of February 1945 and to and including the 5th day of March 1945.

Dated this 30th day of January 1945.

JAMES ALGER FEE

United States District Judge

Approved:

NICHOLAS JAUREGUY

Of Attorneys for Defendant

[Endorsed]: Filed Jan. 30, 1945. [16]

[Title of District Court and Cause.]

EXTENSION OF TIME

This matter came on to be heard upon the application of the above named plaintiff for an order granting an additional extension of time within which plaintiff may file his transcript on appeal and it appearing to the Court that said application should be allowed it is

Ordered that the time within which plaintiff may file his transcript on appeal in the above entitled action be and the same is hereby extended for a period of twenty days from and after the 5th day of March, 1945, to and including the 25th day of March, 1945.

Dated this 2nd day of March, 1945.

JAMES ALGER FEE

United States District Judge

Approved:

NICHOLAS JAUREGUY

Of Attorneys for Defendant

[Endorsed]: Filed March 2, 1945. [17]

[Title of District Court.]

CLERK'S CERTIFICATE

United States of America

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2403, in which Chester Bowles, Administrator, Office of Price Administration is plaintiff and appellant, and L. G. Trullinger is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause together with exhibits 1 2 and 3.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 19th day of March, 1945.

[Seal]

LOWELL MUNDORFF

Clerk

By F. L. BUCK

Chief Deputy [18]

In the District Court of the United States
for the District of Oregon.

Civil No. 2403.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

L. G. Trullinger,

Defendant.

Portland, Oregon, Monday, October 2, 1944.
10:25 o'clock A.M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Adams F. Joy, Attorney for the Plaintiff.

Mr. Nicholas Jaureguy, Attorney for Defendant.

Alva W. Person, Court Reporter.

PRE-TRIAL

Mr. Jaureguy: Your Honor, this is a pre-trial
of a case of the OPA.

The Court: Are you going to call some matter?

Mr. Jaureguy: No, we don't want any time.

The Court: I mean now this morning. You have
an OPA matter and I am rather prepared for what
might happen.

Mr. Jaureguy: Well, I will merely say, this is
an action for treble damages brought by the Ad-

ministrator and counsel has just offered to give me, or loan me, a copy of the regulation that was in force at the date of the sale. They have furnished all their regulations and they are all of later date, with amendments. So he is going to furnish me that, and he is going to underline these portions of it which are applicable to this case and which simplifies matters, I want to say, considerably to me, because I am having trouble with it and I don't have these transactions in the regulation.

It will be our contention at the trial that there wasn't any overcharge, on account of the fact that there were many additional parts that were given, and, therefore, when you take new parts that were given along with a tractor there were no additional parts and it came within the limits.

I might say that the defendant thought at the time that the—he hadn't read the regulations, but he thought at the time he was dealing with another provision of selling a guaranteed machine but he made the mistake of not giving the guarantee in writing, so the regulations require a guarantee must be given in writing. I think had it been in writing it would not have been over the ceiling, but he erred in giving it orally. [2*]

The other contention to be made at the trial is, this action is not properly brought. It is not an action by the Administrator but by the purchaser. Your Honor may recall, the purchaser, under certain circumstances, has the right. Under other cir-

*Page numbering appearing at top of page of original Reporter's Transcript.

cumstances the Administrator has. There have been decisions on this point and they are somewhat at variance. Two decisions I have run across are certainly in favor of the defendant in this case, and that is the Administrator has not the right to bring this action. However, I have run across one lately to the contrary.

So that will be I think the probable legal point in it, and that is about the size of it, so far as the defendant is concerned.

The Court: How much is involved?

Mr. Jaureguy: The alleged overcharge is about \$800, and they are suing for treble damages.

Mr. Joy: If the Court please, Mr. Jaureguy has stated it is rather a simple case. I have two exhibits I would like to introduce, if I may. One is the regulation itself and the other is evidence of the sale of the tractor itself. I am introducing those two exhibits.

We contend the Administrator does have the right of action, inasmuch as there was no guarantee, in writing, as is provided to require that. Of course the sale was over the ceiling and the treble damage right is given in the Act itself. [3]

The Court: Well, you pleaded good faith under the amended statute, Mr. Jaureguy?

Mr. Joy: No.

Mr. Jaureguy: I don't know as my answer would be sufficient for that. The statute had not been amended. It just came to my attention about a week ago, the amendment to the statute. I will wish, however, in the pre-trial order to cover that,

unless your Honor thinks I should also file an amended answer.

The Court: I think you should. That is the practice in other cases—an amended and supplemental answer.

Mr. Jaureguy: Yes. Your Honor, prior to the filing, or the tendering of the pre-trial order, I will present an amended answer to show good faith. I understand of course from counsel about them. He has not stated today, but he discussed with me when I saw him before, that the Administrator does not have the right of action; that only the purchaser has the right of action.

Mr. Joy: Yes, your Honor. The Administrator has the right of action, we claim.

The Court: When would you like to try this case?

Mr. Jaureguy: I would like to try it before the latter part of this month, or any time after that would be all right.

Mr. Joy: Any time, your Honor, suits us.

The Court: November 14th? [4]

Mr. Jaureguy: November 14th is satisfactory to me.

Mr. Joy: That is fine.

Mr. Jaureguy: Now I have some exhibits here——

The Court: Suppose you just identify them between yourselves and with the Reporter.

Mr. Jaureguy: Yes. I would like to use them for the trial, and I would like also to have either the regulation to be used, or a copy of them.

The Court: Work that out between you. Mr. Joy knows the contents of them, doesn't he?

Mr. Jaureguy: The matter I have here is a mass of invoices showing the new parts he had purchased.

The Court: I will take this other matter up now.

(Thereupon the pre-trial hearing was concluded.) [5]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had upon the pre-trial of the case wherein "Chester Bowles, Administrator, Office of Price Administration," is plaintiff, and "L. G. Trullinger" is defendant, Civil No. 2403, heard October 2, 1944, before the Honorable Claude McColloch, Judge; that I have prepared a transcript of said proceedings, and the foregoing five pages, numbered 1 to 5, both inclusive, contains a full, true and correct record of said proceedings.

Dated at Portland, Oregon, this 28th day of February, A. D. 1945.

.....

Court Reporter [6]

[Title of District Court and Cause.]

Portland, Oregon, Monday, November 13, 1944

1:30 o'clock P. M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Mr. Adams F. Joy and James A. Little, Attorneys for the Plaintiff.

Mr. Nicholas Jaureguy, of Attorneys for Defendant.

TRIAL PROCEEDINGS

The Court: Go ahead, Mr. Joy.

Mr. Joy: If the Court please, this case comes before the Court as a result of a crawler-type Allis-Chalmers tractor by the defendant to one E. Gilmore, at a price alleged by the plaintiff to be in excess of the proper ceiling price as [7] allowed by Maximum Price Regulation 136. The overcharge in this case is alleged to be \$798, inasmuch as the correct ceiling price is \$2002, and it is admitted its selling price was \$2800.

The evidence will show that the tractor was sold in an as-is condition and not guaranteed.

If the Court please, I would like to move the Court for the admission of Mr. James A. Little, who is at my right, who is employed as an attorney at the Office of Price Administration. There is a written application for Mr. Little's admission.

The Court: All right. Mr. Jaureguy.

Mr. Jaureguy: If your Honor please, as Mr. Joy says, this case involves the sale of a tractor and it is contended by the OPA that the sale was beyond the ceiling price. We admit there was a tractor involved but that is all we admit.

In that respect our contentions are, first, that what was sold is not within the regulation itself claimed was violated; second, that there were other things sold besides the tractor; and, third, that if there is a cause of action that cause of action is in the purchaser and not in OPA.

I would like to elaborate a little bit on the first two of those points particularly.

Mr. Trullinger, who at that time had a sawmill in [8] Hood River and now has one in The Dalles, had purchased this tractor from a farmer sometime before that. In the summer of 1942 he put in many repair parts, and it so happens he didn't use the tractor much that year. The amount that he used it would be estimated to equal about thirty day's use, so these repair parts had had very little use, and then in 1943 he determined to put in more parts so that when he came to use the tractor again it would be in first-class condition. So he purchased additional parts in 1943, and we will have an itemized statement of most of the parts, as far as the number of parts are concerned.

So far as another set of parts, they go to the track, what is known as the track. That is the thing that goes around. And he has shown what that cost him, about \$250, being about \$500 that he put in parts in 1943, which had not been used at

all, in addition to approximately what you would estimate to be the amount of labor to install them. So that he had a tractor here on which the ceiling price would have been 55 per cent of the new price, if he had not put any new parts in whatever.

Then he advertised it for sale and Mr. Gilmore came up from Dallas and looked at it, and all these new parts, of course they were not secondhand parts of secondhand machines; they were new parts; and so he sold it for \$2800.

There was a misunderstanding—I can say this with [9] respect to the ceiling price; I have said to your Honor that a secondhand machine ceiling price is 55 per cent of the new price. Mr. Trullinger and I think Mr. Gilmore, too, were of the opinion that the amount of the new price on which that 55 per cent is based is of a machine delivered; that is, a machine to be bought in Hood River or The Dalles; that in the event by studying the regulation that the new price upon which the 55 per cent is calculated is f.o.b. factory. which of course is much different, but the parties here believed when they took the machine as it was and the new parts, that the price was about equivalent to a ceiling price. I may say that he sold not only the tractor but he sold two parts on the tractor, I think it is admitted by the OPA he could make an extra charge for.

Then he also sold all these used parts that had been taken out of the tractor. He also sold those. That is, he sold the new ones that had been put in the tractor and the old ones that had been taken

out, because they are of use to a person who has a tractor. Something goes wrong and he can't get new parts, he can use the old ones; so instead of having to sell the tractor, why, the tractor guard and the bull hook and parts that went in the tractor, although many parts, I may say, were duplicated, although I may say after Mr. Gilmore took the machine for some reason or other he never took the parts and I don't think it will be denied [10] those parts were part of the sale price.

So I think if your Honor finds that the sale of the tractor and the sale of the parts was within this regulation 136, that they claim was violated—and I am not going into that now, because it is just taking that regulation and going over, and over and over it—I think your Honor will find it was not, that the price which was charged for this merchandise was not in excess of the ceiling price.

Then the last point we make is that, if there was a violation, the right of action does not lodge with the OPA but the right of action lodges with the purchaser, the rule being as it existed at that time and as it now exists with respect to this transaction, that either the purchaser has a right of action for damages or the Office of Price Administration has a right of action for damages, but there is no duplication. The statute says that the purchaser has a right of action for the business for use or consumption other than in the course of trade or business, and that expression, use or consumption other than in the course of trade or business, has been con-

strued I think perhaps seven or eight times by various Courts, and I think that we will satisfy your Honor that most of the Courts have construed it to mean that a purchase for resale does not have a cause of action because he has purchased for use or consumption in the course of trade or business, but that a person who is [11] himself the ultimate consumer has not purchased for use in the course of trade or business but he has purchased for his own use, and I think it will not be disputed here Mr. Gilmore purchased this machine for his own use and for that additional reason we say that the plaintiff is not entitled to recover because any cause of action is not in the Administrator but in the purchaser.

Mr. Joy: Call Mr. Gilmore. Will you come up, please.

PLAINTIFF'S EVIDENCE

EARL GILMORE

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Joy:

Q. Will you state your name to the Court, please? A. Earl Gilmore.

Q. And what is your business or occupation?

A. Logging.

Q. How long have you followed that?

A. Some thirty-four years.

(Testimony of Earl Gilmore.)

Q. On or about April 7th, 1943, did you purchase a crawler-type Allis-Chalmers tractor from the defendant, Mr. L. G. Trullinger?

A. Yes, sir.

Q. And what did you pay for that? [12]

A. Twenty-eight hundred dollars.

Q. Will you describe the tractor in this way?

A. Well, the tractor, in my own opinion, should mean, and the condition of the tractor was very poor——

Mr. Jaureguy: I move that that be stricken.

Mr. Joy: Just a minute.

Q. What kind of tractor was it?

A. Allis-Chalmers.

Q. Was it a crawler-type?

A. Crawler-type.

Q. What equipment did you receive in addition to the tractor itself? What extra equipment, if any, did you receive?

A. Well, there was one bull hook, one grease gun, and two wrenches for the cat.

Q. Did you compare the serial number which was on the bill of sale you received from the defendant with the actual serial upon this tractor?

A. I did.

Q. And it was the identical serial number?

A. Right.

Q. Do you know the horsepower of this machine when it was rated at the drawbar?

A. Supposed to be 50 horsepower.

(Testimony of Earl Gilmore.)

Q. What did you receive in writing, and what type of a written instrument, if any? [13]

A. Just a bill of sale.

Q. Was anything in the nature of an invoice given you, a written invoice?

A. Nothing.

Q. Now for what purpose did you buy this tractor? A. For logging.

Q. And did you use it for logging?

A. Very little.

Q. And why?

A. Because it was no good.

Q. Will you describe why it was no good?

A. It would not pull. There was water in the block. It was a cracked block. It would break the sleeve in two.

Q. How many times a week—how long did you use this for your purposes of logging?

A. Well, I imagine I did for three weeks, but I didn't log but actually one day.

Q. As the result of this condition you have described? A. Yes.

Q. How did that affect your business as to logging? A. Pretty much.

Q. Did I ask you how many years you had followed in the logging trade? A. Yes.

The Court: Q. Thirty years. [14]

Mr. Joy: Q. Thirty years?

A. Some thirty-four.

Q. You understand your business, then, do you?

A. I think I do.

(Testimony of Earl Gilmore.)

Q. Now as regards the actual sale, you remember the occurrence. Who was present?

A. Oh, me and my wife.

Q. And who else? You and your wife and who else?

A. And Mr. Trullinger.

Q. The three of you?

A. That is all.

Q. All right. At that time what price was asked? What price was asked at that time?

A. Twenty-eight hundred.

Q. And you paid the twenty-eight hundred dollars?

A. I did.

Q. In Cash?

A. In cash.

Q. What was said, if anything, relative to a guarantee?

A. He said that the price wasn't right to guarantee it. It wasn't enough money to guarantee the cat.

Q. Did you understand by that that if you had paid him more money he would have guaranteed it?

A. Possibly.

Q. In any event, your statement is now that he did not guarantee [15] it?

A. That is right.

Q. Did he affirmatively state that he would not guarantee it?

A. That is right. He said there was no guarantee with it.

Q. Did Mr. Trullinger at that time state anything to you relative to the mechanical condition of this tractor?

A. Yes. He said it was in pretty fair condition. He said he reconditioned it himself, although he said that there was a spark plug that wasn't working right, which was making it miss.

Q. Did you later determine whether that statement was correct? As a mechanical statement, I mean?

A. No. That statement wasn't correct. There was water in the——

Q. You have had considerable experience with mechanics, have you not?

A. I have, but I am not a mechanic, though.

Q. But you understand, do you not, the tractor had a cracked block?

A. That is right, yes. I had a mechanic look for me, too.

Q. Did you in this instance have a mechanic look into it? A. Yes, I did.

Q. Was it, in fact, a cracked block when you received it?

A. That is right. It must have been.

Q. And the mechanic told you that? [16]

A. Yes.

Mr. Jaureguy: Just a minute. I move that that be stricken—what the mechanic told him.

The Court: Stricken.

Mr. Joy: All right.

Q. Now you are following this logging industry, the business of logging, as a livelihood, aren't you?

A. That is right.

Q. And are you paid particularly? I mean, in

this operation in which you have attempted to engage with this tractor how are you paid? How do you receive your pay?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial.

Mr. Joy: Well, your Honor, I wanted to show what was interrupted, his line of work that was interrupted by the quality of this machinery he purchased.

The Court: Why? I am not in a hurry but I just don't see why you want to do that? If you want to do it bad enough I might let you do it. I just wondered why you want to do it.

Mr. Joy: Well, under this regulation, your Honor, I wanted to show that this was used in the course of trade and business. You know that is a phrase in the regulation I think on one side as contrasted with——

The Court: You might stand up and tell me what your construction of the regulation is. Mr. Jaureguy has told me [17] his construction of it.

Mr. Joy: Your Honor, if possible I should have answered Mr. Jaureguy.

The Court: Well, do it now.

Mr. Joy: It is our contention there are two types of sales, the retail sale, which I don't think I need to describe, or the wholesale type of sale, which is referred to in the regulation as the sale in the course of trade or business. The word "wholesale" is not used. By that the regulation, as we interpret it, means anything used for the purpose of making a livelihood, which is said to be in the course of

(Testimony of Earl Gilmore.)

trade or business. In other words, a retail purchase is something that you consume; it is consumer goods; whereas a purchase made for use in the course of trade or business, such as we claim a tractor to be for the purpose—and I was trying to bring out the same as his living that way; that is, something purchased in the course of trade or business we claim takes it out of the retail purchase. I don't like to say, common sense will tell you but the retail purchase is for consumer trade.

The Court: Who has the right to sue there?

Mr. Joy: The purchaser. After thirty days it is an alternative right that both the Administrator——

Mr. Jaureguy: That doesn't apply to this case.

Mr. Joy: I am wrong at that, your Honor. I wish to re- [18] tract that. Now at the present time that holds good but at the time of this purchase it lay only in the purchaser, if it were at a retail level. We claim, whether I am presenting it or not, that anything in the nature of a tractor, which was used in the industry, is certainly used in the course of trade.

The Court: Well, when did this happen?

Mr. Joy: The 3rd of April—7th of April, 1943.

The Court: Well, at that time wasn't there an option?

Mr. Joy: No. The exclusive right lay in the purchaser at that time. There is now an option after thirty days.

(Testimony of Earl Gilmore.)

The Court: Wasn't there something about fifty dollars? No; it was all in the purchaser.

Mr. Joy: Well, either way; either the overcharge of \$50 or treble the overcharge.

The Court: What about all these secondhand sales that you are policing, the refrigerators and electric stoves?

Mr. Joy: Yes, your Honor.

The Court: And old luggage, and things like that?

Mr. Joy: That was a sale in what we call—that is a retail sale, your Honor, and you may sue for three times the amount of the overcharge or \$50, whichever is the greater.

The Court: No. Some of these women around here are cleaning up a lot of their old stuff and you are checking on them all the time. [19]

Mr. Joy: That is right, your Honor.

The Court: They run an ad in the paper and say, "We have a waffle iron in good condition for sale," and they will get a telephone call from somebody and it will turn out that will be one of your investigators. They will say, "We have read the ad," but if they have been successful and sold that to some junkman he would come to their house and they get a price above the ceiling he would have had the right to sue there.

Mr. Joy: As of today, your Honor?

The Court: No; as of that date.

Mr. Joy: As of that date?

The Court: Yes.

(Testimony of Earl Gilmore.)

Mr. Joy: The right would lie with the junkman.

The Court: Well, what is the difference between selling a used refrigerator and selling a used tractor?

Mr. Joy: Because a used tractor is sold for the purpose of earning a living. That would be in the course of trade or business.

The Court: Well, in other words, if it had been a refrigerator of a commercial type you think the rule would be different?

Mr. Joy: I would say——

The Court: Or a butcher shop?

Mr. Joy: ——one of those would be all right.

[20]

The Court: They don't have to be so big as that. Just think of two refrigerators now. They have commercial sizes and residential sizes. At the time you are talking about one of them was sold and so likely the right would have been in the purchaser; if a commercial type were sold the right would have been, by your argument, in the OPA, in the Government?

Mr. Joy: Well, I suppose that does reach a zero point somewhere.

The Court: I am just trying to get the distinction you make. Suppose this had been a 7-passenger automobile for pleasure purposes rather than a tractor?

Mr. Joy: That would have been a retail sale, your Honor.

(Testimony of Earl Gilmore.)

The Court: The right would have been in the purchaser?

Mr. Joy: That is right.

The Court: And if it had been a pickup for use in business the right would have been in the OPA, the same as you claim now for this tractor? I am just trying to get your distinction?

Mr. Joy: Yes, your Honor. I am going to try to answer it. It is getting pretty close.

The Court: I don't want to drag you away, other than close. I should think by your logic if you could say for this tractor you could say for the sale of a pickup truck to be used in the business.

[21]

Mr. Joy: I think a pickup truck is considered a truck as contrasted with a pleasure car.

The Court: That is the issue, isn't it, Mr. Jaureguy?

Mr. Jaureguy: That hits it pretty close, I think. I can give another illustration, however, if you will pardon me for interrupting.

Mr. Joy: Yes. I want to give one, too.

Mr. Jaureguy: Just as an illustration, one of the judges gave. I would like to use this one that one of the judges gave.

The Court: Does he have authority to support his views?

Mr. Jaureguy: Yes, he has some authorities, and I have authority, too. One of the judges uses this: If a man happens to use boots and he is a farmer, if he uses boots to go out hunting or around

(Testimony of Earl Gilmore.)

the place, he has the exclusive right of action, but if he uses boots in connection with his irrigation, or something of that kind, then he has no right and the OPA has the right of action.

The Court: The regulation has been changed, as I understand it?

Mr. Jaureguy: Only in this respect: The purchaser has the exclusive right, but if he does not exercise it within thirty days the OPA has the right.

Mr. Joy: That is right. The first thirty days it is the exclusive right, but after the first thirty days the [22] OPA has it. To determine whether it is in the course of business, if I may give an example to say some printer down here sells a printing press to another printer, it certainly could not be very different from a logger selling a logging tractor to another logger who was going to use it for exactly the same purpose.

The Court: If this transaction happened now to be actionable after thirty days the OPA would have the right of action?

Mr. Jaureguy: Yes, that is correct.

Mr. Joy: We claim, your Honor, in this case a purchaser would never have a right of action, because this is a sale in the course of trade or business, in which case it is only in retail that the purchaser ever has the right.

The Court: Not according to Mr. Jaureguy's contention.

Mr. Joy: I can't subscribe to that.

(Testimony of Earl Gilmore.)

The Court: You will subscribe to that if this happened: You would have a right of action for three times, and you don't agree here he would have it from today?

Mr. Joy: That is right. The purchaser would never have a right of action in retail purchase. I think there will be a slight difference in the number of days, but we are not going to——

The Court: Well, retail purchase is a treacherous term, isn't it?

Mr. Joy: Your Honor, if I am not repeating myself, we [23] look to the use largely, however, although it is formal in the case of a tractor that is being used for agricultural purposes, that we also claim is in the course of trade or business, because it is in the same general business. It is being used for the purpose of earning business or profit.

The Court: The distinction does not revolve around whether or not it is retail, does it, surely? Doesn't that confuse the question, to state it that way? Suppose he bought this tractor from a secondhand dealer in tractors and similar equipment, that would be a retail purchase?

Mr. Joy: The purpose for which it is used will be the test of use to which it is put.

The Court: The word "retail" does not come in at all in the discussion, does it?

Mr. Joy: I think it has no place in this case. It has nothing to do with this case. It is absolutely redundant, if that is the right word.

(Testimony of Earl Gilmore.)

The Court: Do you want to make a little contribution on this?

Mr. Jaureguy: I want to say when it comes to arguing this I want to go into it at some length.

The Court: All right.

Mr. Jaureguy: But the question now, if we may refer to that, before the Court, is not whether he used it in his trade or business but when he did use it, in whatever he [24] used it for, whether he lost money in using it, and I don't see how that has anything in the world to do with this case.

Mr. Joy: Oh, no. I am not contending that.

Mr. Jaureguy: You asked the question and I objected.

Mr. Joy: Your Honor, since Mr. Jaureguy has brought that up, I wanted to show it was due to the condition of the tractor he had to go out of that line of business, which he did.

The Court: All right.

Mr. Joy: The condition was bad. That was my point there.

The Court: He didn't use it in this case in his business, because he could not use it.

Mr. Joy: That is exactly it.

The Court: It was no good. That brings in another question.

Mr. Joy: Let me ask the witness something else in that respect.

The Court: He used it only one day, he thought—got only one day's use of it.

Mr. Joy: Q. Will you explain to the Court

(Testimony of Earl Gilmore.)

now the result upon your business of the condition of this tractor when you bought it?

Mr. Jaureguy: The same objection.

The Court: He may answer.

Mr. Joy: I want to bring that point up. [25]

Mr. Jaureguy: Well, it is not admissible.

Mr. Joy: I believe the Court ruled you may answer. Just explain to the Court about that.

The Witness: How was it you wanted?

Q. I wanted to know what effect upon the condition of your business, the condition of this truck had?

Mr. Jaureguy: The same objection.

A. It was pretty bad.

The Court: Did it put you out of business, you mean?

A. It finally did put me out of business.

Mr. Joy: Q. About how long?

Mr. Jaureguy: I want the same objection. I don't think the Office of Price Administration ought to be trying to inject prejudice in these cases.

The Court: It won't prejudice me.

Mr. Jaureguy: I am not saying it will, but he ought not to be even trying it.

The Court: He may have a theory.

Mr. Jaureguy: He may have a theory, but I submit if he does have a theory it is very illogical.

The Court: He has a theory. He bought it for his business and he made such a bad deal he lost his business.

(Testimony of Earl Gilmore.)

Mr. Jaureguy: Another thing, it could not have been guaranteed to be in the condition it was. If it had been——

Mr. Joy: That is all right. No, that is not correct. [26] You can guarantee anything you want to. This witness has testified it was not guaranteed, and on that we will agree with him it was not guaranteed, in the sense he is talking about. He was given a guarantee but it was not in the sense he is talking about now—that is, an oral guarantee.

The Court: All right. Hurry up now. Now I am getting in a hurry.

Mr. Joy: Well, I guess that is about all we have. I believe that is all, your Honor.

Cross Examination

By Mr. Jaureguy:

Q. Now you say you bought what? What was it you bought from Mr. Trullinger?

A. A tractor.

Q. And what else? A. That is all.

Q. Well, you have already told us you bought a tractor, and a bull hook, a grease gun and two wrenches? A. Well, that was the size of it.

Q. Didn't you buy some armor?

A. Yes; the armor was on there, and the radiator guard, and a bumper.

Q. And you bought that and two wrenches. And did you buy anything else? A. No, sir. [27]

Q. Well, I want to hand you your bill of sale then? A. Well, what else?

(Testimony of Earl Gilmore.)

Q. Yes. I want to hand you your bill of sale and have you read that. Now that says armor, bull hook, wrenches, and miscellaneous parts?

A. Yes.

Q. What were those miscellaneous parts?

A. That is what I don't know. I didn't get them. You don't know what that had reference to?

A. I didn't get them.

Q. I am not asking you that. I am asking you if you know what that had reference to.

A. No, I don't.

Q. What is that?

A. I don't know what it has reference to.

Q. Did you have any discussion with Mr. Trullinger about these miscellaneous parts?

A. Well, I imagine the miscellaneous parts that he wanted me to take was the old sleeve, the old rails or old goughers that was fit for the junk pile.

Q. You say you imagine that. Where do you get that?

A. Well, he asked me if I wanted to take them and I said, "They are not worth hauling away."

Q. When was that bill of sale drawn up, before or after you had that conversation? [28]

A. After.

Q. And after you had the conversation, and when you saw that in the bill of sale did you have any discussion with him?

A. No, I don't know as I did.

Q. In other words, you didn't call his attention to the fact that there were things in there that you were not taking?

(Testimony of Earl Gilmore.)

A. I don't believe I did. We were in the bank at Hood River when this was made out.

Q. Now prior to that time had you discussed with him the new parts that he had put in the tractor?

A. Yes, I believe we had.

Q. What is that?

A. I think we had.

Q. There were quite a few new parts in it, weren't there?

A. Not so many.

Q. What about the track?

A. Yes; there was new track, new rail.

Q. And the new track, as you know probably cost two hundred fifty, doesn't it?

A. I think I do.

Q. Yes. And what other parts did you discuss that were new?

A. Well, there might have been a new piece for the motor, but that is a very hard part to discuss—to determine whether it really was or whether it was the old one. There was an old one there, but that is a question. They may be twenty [29] years old or they may be six months old. That is a hard question to determine.

Q. Yes. Well then, what else did you discuss that was new?

A. Well, I don't think there was any other new parts.

Q. How did you arrive at this price of \$2800?

A. In what way do you mean now?

Q. You had gone elsewhere, looking elsewhere for a tractor, too, hadn't you?

A. I had been, yes.

(Testimony of Earl Gilmore.)

Q. You had looked all over this state for a tractor?

A. Not too bad. No, no, not all over the state.

Q. Well, no, but in Polk and Washington and Multnomah?

A. Not very—not so much as that.

Q. And Wasco Counties? A. Oh, no.

Q. Well, you bought this in Wasco County? No; this was in Hood River County, wasn't it? Yes. And how did you arrive at a price? Was anything said about ceiling prices?

A. Yes. I asked him if he was within the price and he said he was.

Q. Yes. And did he tell you why?

A. No. We didn't ask that.

Q. Well, you knew about ceiling prices, didn't you?

A. Oh, I did in some ways, yes. He said he wasn't over the ceiling price. [30]

Q. And did he tell you why? A. No.

Q. Didn't he discuss with you what the ceiling price was? A. No.

Q. As he understood it, I mean?

A. We did not.

Q. And so you bought it for \$2800, and you bought those articles that are mentioned in the bill of sale, except you didn't get the miscellaneous parts?

A. That is right. I didn't get no miscellaneous parts.

Q. Well, they were there, weren't they?

(Testimony of Earl Gilmore.)

A. They were no good to nobody.

Q. Well, if you will, just answer the question I ask you; then you can answer other questions.

A. I don't know whether they were there or not.

Q. Did you see them?

A. I don't know whether I did or not.

Q. Didn't you just get through telling us you saw them there?

A. Oh, yes, I seen these old sleeves and those old wires there.

Q. Yes.

A. What good would they do anybody?

Q. I don't know. I don't know anything about that line of business. Then you took it back to Dallas?

A. Yes.

Q. And a few days later you went up to Oscar Hayter and [31] wanted him to sue for you, didn't you?

A. Oh, it was some time afterwards, not a few day.

Q. That is, you thought you had a cause of action?

A. Huh?

Q. You thought you had a cause against him?

A. Well——

Mr. Joy: That is objected to as not proper cross examination.

Mr. Jaureguy: Well, it is proper cross examination as to whether he had it. In a way, that would indicate to him he did or did not have a case.

The Court: Go ahead.

Mr. Jaureguy: Yes.

(Testimony of Earl Gilmore.)

Q. That is, you thought you had a cause against him?

A. No. I don't know now as I ever mentioned it to Oscar Hayder much.

Q. Much? Well, I didn't say much.

A. Until along at the last part before Hayter died. Possibly there would have been a case if Hayter hadn't died.

Q. You mean on your behalf? A. Yes.

Q. That is, you had Mr. Hayter write a letter for you to Mr. Trullinger, didn't you?

A. I believe I did.

Q. Yes; in which you threatened to sue him?

[32]

A. (Witness nods his head.)

Q. Yes. That is correct? I don't know as the Reporter got your answer yet. Your answer was, "Yes," that you had threatened to sue him?

A. (Witness barely making a nod with his head.)

Q. Well, you don't know any more about the new parts that were there except the track and the sleeves, then? A. No.

Q. There were other new parts, weren't there?

A. No, there wasn't that I ever saw.

Q. What is that?

A. There wasn't that I seen.

Q. Well, the parts were inside, weren't they?

A. Well, how would I know whether they were inside or not? I couldn't see them.

(Testimony of Earl Gilmore.)

Q. Well, that is what I say. So that all you know about is the track and the sleeves, but as to other parts they might have been there and they might not? That is a fair way to say it?

A. Yes, that is a fair question.

Q. Yes. And a fair answer, too, isn't it?

A. Yes.

Mr. Jaureguy: That will be all.

Mr. Joy: I think that is all. Thank you.

(Witness excused.) [33]

Mr. Joy: Mr. McQuiston.

CLAUDE BYRON McQUISTON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Joy:

Q. Please state your full name to the Court.

A. Claude Byron McQuiston.

Q. Your occupation, please?

A. Assistant Manager for Allis-Chalmers Manufacturing Company.

Q. How long have you worked for the Allis-Chalmers people? A. Oh, since 1931.

Q. During that period of time have you worked with a big family, with tractors and the prices thereon in general?

(Testimony of Claude Byron McQuiston.)

A. I have to do with the settlements and——

Q. Sales?

A. ——accepting orders and filling orders for dealers, et cetera.

Q. And you are familiar with the types and prices? A. Of various models, yes, sir.

Q. Are you familiar with a certain tractor described as WK03982 Serial Number, which was sold in 1935, in June of 1935?

A. We have a record of such a sale in our office.

Q. Have you with you the data with which you can give us the drawbar, pull, and so forth, of this tractor? [34]

A. I have the catalogue here with specifications in it.

Q. Will you get that, please. Will you give us the drawbar horsepower of this particular tractor?

A. WKO gives the horsepower at the drawbar 49.58.

Q. And at the belt?

A. Belt horsepower 57.99.

Q. The number of cylinders?

A. Four cylinders.

Q. Fuel used? A. Diesel oil.

Q. Type of ignition?

A. Spark plug ignition.

Q. The weight?

A. The shipping weight approximately 11,425 pounds.

Q. How many transmission speeds forward?

A. That particular tractor had eleven forward.

(Testimony of Claude Byron McQuiston.)

We built that tractor with three speeds and another at four speeds. This one——

Q. Yes. Did you finish? A. Yes.

Q. What was the nearest in your equipment power to this?

Mr. Jaureguy: Objected to as calling for the opinion of the witness.

The Court: Answer.

A. Comparable in horsepower would be our gasoline model WK. [35]

Mr. Joy: Q. Will you give us the drawbar horsepower again?

Mr. Jaureguy: Will you give us that model again?

A. WK. That is the gasoline. The drawbar horsepower 55 even.

Mr. Joy: Q. Belt horsepower?

A. The belt horsepower is 63.96.

Q. Cylinders? A. Four cylinders.

Q. Fuel used? A. Gasoline.

Q. Type of ignition? A. Spark plug.

Q. Weight?

A. Shipping weight described in our price manual here includes dunnage 12,040 pounds.

Q. Transmission speeds forward?

A. This late literature I have here shows four speeds now. I am not certain what——

Q. Selling price?

Mr. Jaureguy: Just a minute. He didn't finish that.

Mr. Joy: Go ahead.

(Testimony of Claude Byron McQuiston.)

The Witness: I am not sure whether that price at that time was with four speed or three speed. At the time——

Q. Was it put out in both?

A. That is what I can't say offhand here.

Q. Well, the other one that you compared with this was put [36] out in both three and four, was it not?

A. That is true.

Q. And this one you are not sure? A. No.

Q. Selling price, please, on this last one?

Mr. Jauregui: I object to that as incompetent, irrelevant and immaterial, on the ground it cannot be equivalent, since one is Diesel and one is gas.

Mr. Joy: The most nearly equivalent, your Honor, was my question—the most nearly equivalent tractor on the market at the time.

The Court: At the time of the sale to Trullinger?

Mr. Joy: Yes, that is right.

Mr. Jauregui: I object on the ground one is Diesel, the other is gas.

The Court: You may answer.

Mr. Joy: They are still the same as the other.

Q. Please give the price of this last one, the WK model.

A. WK?

Q. F.o.b. factory, please?

A. \$2880 at the factory.

Q. \$2880? A. \$2880.

Q. And I didn't ask you the selling price of the first one. Will you give me that WKO3982, the first one, the one which [37] is involved in this trial?

A. The price list I have is dated April, 1936.

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Your Honor, I will object to it, then.

The Witness: And the catalogue number bears the same.

The Court: Why are you bringing that up?

Mr. Jaureguy: Because that is the price of 1936 and the question is the price of April, 1943.

Mr. Joy: I am trying to determine the most nearly comparable tractor, your Honor.

The Court: Well, why do you want the price in '36 of anything?

Mr. Joy: I don't. You see, I am trying to determine as nearly as I can the price of a tractor which had gone out of production at the time the sale was made.

The Court: Yes.

Mr. Joy: I am trying to establish a price, because I can't use that price. They didn't manufacture it, and this man is going to, I hope, show, your Honor, the nearest to that, and we are going to take that price.

The Court: Yes.

Mr. Joy: If it is satisfactory. Your Honor, my colleague suggested something—I may not have made it clear: On October 1st, 1941, which is the date when tractor prices were frozen, we had not this tractor involved in this case selling new. In order to get an intelligent selling price [38] we have to take the nearest comparable tractor, which incidentally is provided for in the regulation—the nearest comparable tractor at that time, and this man is

(Testimony of Claude Byron McQuiston.)

in a position to know the nearest comparable tractor. I am trying to bring that out.

The Court: Yes, but why do you want the price in '36?

Mr. Joy: No; nothing, your Honor.

The Court: That is what we are talking about.

Mr. Joy: Oh. That is right. I had forgot to ask the question.

Q. On October 1st, 1941, was the WKO, the Allis-Chalmers crawler-type tractor, WKO model, in production at the factory? A. In 1941?

Q. Yes. A. No.

Mr. Joy: I had forgotten to ask that question.

Q. At that same date, on October 1st, 1941, you had no factory price of this model WKO involved in this suit? The Allis-Chalmers people were not publishing lists, selling prices, on the tractor involved in this suit, which I know you are familiar with, in 1941; is that true?

A. The tractor was out of production. The price list was taken out of our books.

Q. That is the point I was trying to make. Would you state the cost of the guard crankcase on the WK model as compared [39] with the same crankcase guard on the WKO model? Would you just state the comparison of those models?

A. They are identical.

Q. All right. That is what I was trying to get at. In other words, is this true: That the parts for the WK model, which is the latter one that you

(Testimony of Claude Byron McQuiston.)

just described, and the WKO model, are interchangeable. A. They are interchangeable.

Q. Now have you the lowest prices before you there of the crankcase guard? A. I have.

Q. Will you state that now. And we will try to go through this in a hurry.

A. We have a combination of prices, I might explain here, dependent upon getting complete guards, or one only. If a person asks for a complete set we must have a starting place or a base price for the balance of the guards to attach to it, you understand.

Q. Very well.

A. First, we start with a crankcase guard, which has a list price of \$45.00.

Q. All right. Radiator guard?

A. A radiator guard \$22.50.

Q. And bull hook?

Mr. Jaureguy: Now I didn't get that first guard. That [40] was the crankcase guard. Is this for ours or for the —

Mr. Joy: Yes. They are interchangeable. I am allowing you to claim—I am allowing you for all of this.

Mr. Jaureguy: Crankcase guard?

Mr. Joy: Yes.

Mr. Joy: Crankcase guard forty-five, radiator guard twenty-two fifty, and did you state the bull hook?

A. That is not a bull hook, as I understand you to call it. It is pull hook, front pull.

(Testimony of Claude Byron McQuiston.)

Mr. Joy: Oh. Excuse me. I misunderstood it.

Mr. Jaureguy: Your letter says bull hook. It is a pull hook?

Mr. Joy: Maybe it is.

Mr. Jaureguy: That is what the locals call it.

Mr. Joy: Whatever it is.

The Witness: We supply a front pull hook at seven fifty.

Q. Is that satisfactory?

Mr. Jaureguy: No. Your letter says \$25.00 is what you allowed for that, for the bull hook.

Mr. Joy: Well, let's pass that. I will stand on what the letter said that we sent out.

Q. The bumper guard? Is that a bumper or a bumper guard? A. A bumper.

Q. A bumper. All right. [41] A. \$17.50.

Q. All right. The 18-inch shoes, the wide shoes?

A. Assuming that—I will have to answer a question here because if you are to put on 18-inch shoes straight out of our repair department it varies. Then if you bought a standard equipped to 15-inch equipment and 18 is involved, 15 is standard equipment.

Q. To give them the advantage of that, give us the price of 18-inch shoes in the condition they had been changed. A. Adding 18-inch shoes?

Q. Yes, that is right. A. \$294.

Mr. Joy: I think that is all, Mr. Jaureguy.

(Testimony of Claude Byron McQuiston.)

Cross Examination

By Mr. Jaureguy:

Q. I don't suppose that you would have any record of inquiries by the OPA heretofore as to the list price on this particular tractor?

A. We have inquiries practically every day from various parties asking prices on our equipment.

Q. Yes. I think probably Oscar Hayter and the OPA both asked you, from the information I have. I am just asking you this to see if there is anything there that fits it other than a list price of \$3723. Do you have anything that hits that list price of a tractor that might be comparable? [42]

A. Thirty-seven hundred?

Q. Thirty-seven hundred twenty-three dollars.

A. I haven't anything at that figure. I could possibly make it up by various——

Q. What is that?

A. Adding various equipment I might make such a price possible. I have no such figure at that in my figures.

Q. Now what is the difference, generally speaking, of two comparable engines, one of which is gasoline and the other of which is Diesel?

A. Assuming they are talking about the same horsepower?

Q. Yes. As near as possible, yes.

A. It so happens that the Model WK and the WKO are one and the same tractor, with the exception of the motor.

(Testimony of Claude Byron McQuiston.)

Q. Yes. One is Diesel and the other is gasoline?

A. One burns Diesel oil and the other gasoline.

I would not call it a Diesel tractor.

Q. What is that?

A. We call it an oil engine WKO.

Q. But isn't a Diesel engine much more expensive than a gasoline engine?

A. Very much so.

Q. And about how much would you say on an engine for a 50 horsepower tractor? What would be the approximate difference between the cost of a gasoline and Diesel engine? [43]

A. Would you like to know the price of the present Diesel we are making now in place of the WKO?

Q. Yes. A. Forty-two hundred fifty.

Q. For the engine or do you mean for the tractor?

A. That is full new tractor, full Diesel tractor.

Q. You say that is in place of a WKO?

A. That has replaced the WKO and the WK gasoline.

Q. Well then, what is the difference between the present one? What did you say that price is?

A. Our new tractor is \$4250 at the factory.

Q. \$4250 at the factory. And how long have you had that one?

A. Oh, I would say about three years.

Q. And what is the difference between that tractor and the WKO?

(Testimony of Claude Byron McQuiston.)

A. It has a full Diesel motor in it.

Q. Wasn't the WKO a Diesel motor?

A. It burned Diesel oil but it was an oil-burning tractor motor, not a full Diesel.

Q. What is that?

A. It was not a full Diesel engine.

Q. I am a little ignorant of some of these technical terms, you know.

A. Well, a full Diesel engine does not use spark plug ignition.

Q. Oh. [44]

A. It explodes the fuel oil by compression and we use spark plug ignition in the WKO oil burner.

Q. But they both burn Diesel oil?

A. Correct.

Q. Well, why, then, do you say that replaced the WKO?

A. That is, the present tractor we are using now as the Diesel.

Q. To replace WKO? Didn't you say that that is what you are now selling is replacing the WKO?

A. In that size tractor, yes.

Q. If somebody came to you and said that he had a WKO and he liked it and wanted something that you would recommend to take the place of it, this is the one you would recommend?

A. Immediately I would think of the horsepower in both and get the new tractor.

Q. Yes. And this is the one you would recommend, of forty-two hundred?

A. That is true.

(Testimony of Claude Byron McQuiston.)

Q. That is the list price, I take it?

A. At the factory.

Q. At the factory. That tractor, that \$4220 tractor, is the one that would come to your mind first before this gasoline engine one that you have been describing to Mr. Joy; isn't that right?

A. The gasoline engine was out of production.

Q. Oh, the gasoline engine one is out of production? [45]

A. Correct.

Q. And this Diesel burning one has replaced both the gasoline and the WKO?

A. That is the only size we have in that horsepower arranged.

Q. And how long has the gasoline one been out of production?

The Court: Two years.

Mr. Jaureguy: Two years.

The Witness: It was taken out about a year and a half or two years ago, I would judge.

Q. Two years?

A. These dates here, May 31, 1943, discontinued, it shows in my book here.

Q. The book is dated you say May 19th?

A. This sheet is my price sheet and shows the model discontinued as of that date.

Q. Well, what does it mean, model discontinued?

A. They could have had a surplus built up in inventory but we could no longer quote the prices on WK because there was no more available.

(Testimony of Claude Byron McQuiston.)

Q. You don't know, then, how long prior to that time they had been selling at the factory?

A. I wouldn't know.

Q. What I mean to say is, you don't know whether you sent any orders two or three or four months before that to find out the factory didn't have them? [46]

A. Not until that time we received that; not until we had occasion or would have sent an order in requisition for one.

Q. Yes, but I say you don't know now whether during the two or three months before you got that sheet you sent any orders and discovered they didn't have any? You can't tell that, as I understand it?

A. Let me get your question right now?

Q. You couldn't tell us when is the last time that you sent in an order for that gasoline engine and discovered that they didn't have any at the factory to sell?

A. I haven't any record here with me, no.

Q. Now what is the difference between, as near as you can give it to us, say between the F.O.B. factory prices and the delivered price at Hood River? Could you give us some idea on that?

A. It varies considerable.

Q. Yes.

A. On account of method of shipments.

Q. Yes.

A. If it is possible to have at least five tractors on a car the freight is much reduced, more than if

(Testimony of Claude Byron McQuiston.)

it comes one tractor or two tractors on a car, or is shipped singly by forwarding freight. The cheapest method of course is carload rates.

Q. But it varies a lot, you say. What would you say a single shipment would be? Can you give us some idea? [47]

A. Yes. At the present time under O.D.T. Regulation a single shipment, it would cost in the neighborhood of \$500.

Q. Now this gasoline is \$2880 at the factory? That is the lowest price?

A. That is it, the lowest price I had.

Q. That is the lowest price you had, but you can't tell us when it was you were sellin' it at that?

A. Yes, sir.

Q. What is the lowest price you had on the WKO at the factory?

A. As near as I can tell, that is the lowest prices I have, rather, or the earliest, whichever you wish to call it—this one I have with me here, which is 1936.

Q. Oh. Could I see that?

A. Certainly. I may have to explain it to you.

Q. Well, I dare say you probably will. What would you say was the description of this gasoline, the one that you were describing to Mr. Joy?

A. The gasoline?

Q. Yes. What did you call that?

A. The WK?

Q. Well, this price list—could I show this to the witness, your Honor?

(Testimony of Claude Byron McQuiston.)

The Court: Yes.

Mr. Jaureguy: Q. This price list you are referring to, that is the same sheet of paper that you gave him, twenty-three [48] forty-five or twenty-two hundred? Which did you give him, twenty-three forty-five or twenty-two hundred there?

A. No. I quoted this price here, the lowest published price, \$2850.

Q. \$2880? A. This one here.

Q. Twenty-eight eighty. That is the WK?

A. WK.

Q. And that price list is September 22, 1941?

A. That is right.

Q. The price is subject to change without notice. Would you know whether that was the same price in April, 1943?

A. Well, let me look at your book and see. That is the catalogue number thirty-four thirty-one—thirty-four.

The Court: A little louder, please.

The Witness: I am talking to myself here. That is the catalogue number, dated May 18th, 1942, is the last published price of that particular tractor WK, \$2880.

The Court: What was the price of the new rig in April, '43? A. The new rig?

Mr. Jaureguy: The new rig. He means the one of the Diesel engine.

The Court: Full Diesel. A. In '43?

The Court: April, '43. Isn't that when this sale was made? [49]

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Yes. That is right.

Mr. Joy: Would it be out of order, your Honor, if I would say something right now?

The Court: No, I don't think it would. I don't know what you are going to say.

Mr. Joy: I am just trying to help. In '41, October 1st of '41, prices were frozen, so that is the date we are interested in.

The Court: Is that your view, Mr. Jaureguy?

Mr. Jaureguy: To tell you the honest truth, your Honor, when you talk about prices being frozen in 1941 you can go over to the OPA and you will see just stacks, and stacks, and stacks of regulations that have come out since October, 1941, changing these prices and changing the ceiling. So I am not willing to take that statement. I can't deny it but I just am not willing to take it.

Mr. Joy: I think your Honor will take judicial notice prices were frozen in 1942 of foodstuffs, freezing the prices. That is customary in the OPA.

Mr. Jaureguy: I will go along with you on that, yes.

Mr. Joy: This is machinery. That is the only difference. It has to have a freezing point somewhere.

Mr. Jaureguy: The regulation here is not October, 1941. It is later than that. Then there were others, a good many others. [50]

Mr. Joy: This was published in '42, wasn't it?

The Court: When did the full Diesel come out? Three years, he said?

(Testimony of Claude Byron McQuiston.)

A. Approximately three years, as I can recall from memory.

The Court: Well, just trust your memory for this. Well, its price then must have been the same. This price must have been frozen, too.

A. I have the price sheet here dated September, 1941. That was the same then.

The Court: Well, that is all we need. Forty-two hundred? A. Forty-two hundred fifty.

The Court: Now you say the question that has been developed, the issue has been developed, Mr. Joy, whether this full Diesel is the most comparable, or this gas rig is the most comparable.

Mr. Joy: Yes, your Honor. I don't want to interrupt.

Mr. Jaureguy: Now I don't know about the Court. Speaking for myself, I am a little ignorant of tractors and engines. Will you explain the difference?

The Court: I am going to take the view that the full Diesel, having supplanted both of them, is the one they sell now to replace both gas and the first Diesel.

Mr. Jaureguy: Yes.

The Court: I will take the view that the manufacturers said about it was the best idea, and that that is the com- [51] parable type so long as it was in production there in September, '41.

Mr. Jaureguy: Now is there any—

The Court: They brought it out to replace two of them.

(Testimony of Claude Byron McQuiston.)

Mr. Jaureguy: Yes.

Mr. Joy: I don't believe the witness actually said that.

The Court: That is what he says.

Mr. Joy: May I ask one question?

The Court: When your time comes. Let him do it when Mr. Jaureguy finishes.

Mr. Jaureguy: In view of that, I do want to ask this question: The difference, from the standpoint of the tractors——

The Court: You don't need to go into it any further for me now—not on this point, if you want to try it before some other judge somewhere, unless——

Mr. Jaureguy: No. I——

The Court: ——unless Mr. Joy is correct in what I understood he said, that the manufacturer brought out this full Diesel to replace the two other rigs.

Mr. Jaureguy: That is right.

The Court: As his idea of what was best in that field for those two other rigs. That is the nearest comparable type then as the '43, as far as I am concerned.

Mr. Jaureguy: Q. Now you also gave us some figures on, what I will call parts, crankcase guard, radiator guard, and [52] something that was \$17, and the 18-inch shoe. Would those prices be the same for the new tractor that has replaced the others?

(Testimony of Claude Byron McQuiston.)

A. They were not scheduled the same, no.

Q. They were not scheduled the same?

A. They are different equipment.

Q. Could you give them to us for the new one?

Mr. Jaureguy: I don't suppose that is material, though, come to think of it. No, it would not be. I will withdraw that question.

Q. The old WKO that didn't have the armor and the bull hook on it when it was sold at that last price, did it?

A. Has the last price been mentioned on the WKO?

Q. No, it has not. Give it to us, will you.

A. \$3095.

Q. And that didn't include the bull hook and the armor, did it? A. No.

Mr. Jaureguy: You may take the witness.

Redirect Examination

By Mr. Joy:

Q. On October 1st, 1941, was the WK in production? A. It was still in my price book.

Q. Then you would infer it was in production?

A. It must have been. [53]

Mr. Jaureguy: In 1941?

Mr. Joy: Yes. I am speaking about the freezing date, October, '41. Then the time of the freezing date, October 1, 1941——

The Court: I don't see what the freezing date has to do with determining comparableness.

Mr. Joy: Very well. I will withdraw that.

(Testimony of Claude Byron McQuiston.)

The Court: The sale was made in April, '43, and the question is, what piece of equipment as of that date was the most comparable to the one that has been sold? It is true you go back to the freezing date to find out the price if it was in production at that time, if we find out this one was, but your comparison is made as of the date of the sale that is under investigation is not what the regulation says. The regulation does not relate you back two years, does it—nearly two years?

Mr. Joy: That is a tough question for me to answer. I guess I will have to pass that. Do you know?

The Court: Better get through with this gentlemen. Then we will take the afternoon recess and try to get along a little faster.

Mr. Joy: Q. Was the full Diesel being made, that forty-two hundred fifty job, October 1st, 1941?

The Court: Yes. He had a price list September, 1941.

Mr. Joy: Well then, if they were both being made on [54] that date, which he states is true, the fact——

The Court: How we make the comparison is of '43, when the sale was made.

Mr. Joy: I would think that the—all right.

The Court: This war might last ten years. Ten years from now, when a man is charged with violating a ceiling price, we won't say, "Did you charge more than a comparable article was sold for thirteen years ago," will we?

(Testimony of Claude Byron McQuiston.)

Mr. Joy: If on this date in October, in '41, the prices were frozen at a certain level, and on this date this WK job was the nearest comparable machine, then wouldn't that price be frozen and go on forward for as many years as necessary to cover this particular case?

The Court: Well, I think——

Mr. Joy: I won't argue, your Honor.

The Court: Well, we had just as well. That is what you are here for. Even taking your statement as true in every way—as correct, rather, in every way—the question of comparableness still exists and that would be determined as of the date of the supposed infraction by the defendant. Now in this case it was '43 and in '43, pretty nearly two years preceding, this company had ceased production of the original Diesel and had brought out this new full Diesel, as it was substituted. Now you may have to look back to '41 to find [55] out what the price was because it was frozen at that date. That simply means in '43 the price was the same as it was in '41.

Mr. Joy: I only propose to bring out the comparableness. No one at all is to set the nearest price. If it was set in '41 for this job it must have continued during that time. It lasted up to this minute.

The Court: Nobody said in '41 that a particular unit being made at that time was the one most comparable to a used piece of equipment that was going to be sold two years later.

(Testimony of Claude Byron McQuiston.)

Mr. Joy: At that time we said that the WK was most comparable to a WKO, which had gone out of production. It was not in production in——

The Court: But what in '43 was the most comparable to the WKO?

Mr. Joy: The 1941 freeze price for the WK.

The Court: Why?

Mr. Joy: Because it was so comparable mechanically.

The Court: In '43?

Mr. Joy: We are speaking now of merely abstract prices being set and machines going out of production. My point is that the frozen price was the most nearly comparable in 1941, when the WK was in production.

The Court: Well, I doubt that we compare units. We don't compare them. We compare units; we don't compare prices to [56] find out what piece of machinery was the most comparable as of the date of supposed infraction by the defendant. Now in April, '43, he sold a used piece of equipment. He was privileged to sell that for 55 per cent of the list price of the then most comparable piece of equipment? Isn't that right?

Mr. Joy: Well, I don't exactly subscribe to that. I think the comparison was made——

The Court: You think that he was entitled to charge 55 per cent of what was the most comparable piece of equipment two years previously?

Mr. Joy: Yes, your Honor. That is when the price was set for freezing period.

(Testimony of Claude Byron McQuiston.)

The Court: Do you agree with that?

Mr. Jaureguy: No. I don't know that you will find where either the regulations here—we will have to kind of possibly go back and forth, but I think the language of the regulation is clear. But I think it reads that way: "The highest maximum price to any class of purchasers for the nearest equivalent new machine or part f.o.b. factory, whether established by this Maximum Price Regulation No. 136, as amended, or by any other price schedule or Maximum Price Regulation or order issued by the Office of Price Administration"—it is better to read the whole sentence: "The price for any rebuilt and/or guaranteed machine or part shall not be more than 85 per cent of the highest maximum price paid any class of purchaser for the [57] nearest equivalent new machine." It doesn't say the time; and similar language in the later subparagraph that refers to secondhand machinery.

The Court: Do you want to take part in this, Mr. Wagner?

Mr. Wagner: If I could interpose a question to shorten it, it would seem to me that the matter of the differential as between the oil-burning ignition type of machinery and the full Diesel equipment should be taken into consideration.

The Court: Well, don't bring that in now. That is not shortening it; that is lengthening it. Let's stay with what we have before us. When we compare units in—what is the date that we compare units?

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: I think that the comparability goes to the similarity of the equipment and also price.

The Court: What date do we compare? We have to compare some date.

Mr. Wagner: I think you can take almost any date and ascertain what the differential is as between the oil-burning ignition type and the full Diesel type and arrive at what the comparable price would be for the equipment as sold in this case. As I understand it, cost and selling price in the case of a full Diesel equipment always is at a much higher figure than with the oil-burning ignition price. Am I right or am I not?

The Court: That seems to be another point. That goes to [58] what types are comparable. I am asking what seems to me to be a question that would admit of a simple answer and has to be answered simply. Do we make this comparison as of the date of the alleged offense?

Mr. Wagner: Well, I——

The Court: I am a man up here with a tractor on my hands, a used tractor, and I want to sell it and I don't want to break the law, and I find that I am entitled to sell it at not to exceed 55 per cent of the cost price new at the factory of comparable equipment. Now comparable equipment at that time.

Mr. Wagner: I would think so. Yes, your Honor.

(Testimony of Claude Byron McQuiston.)

The Court: That is all I want to know.

Mr. Wagner: At that particular time.

The Court: That is all I want to know.

Mr. Wagner: However——

The Court: Now that leaves the question open for argument, whether the full Diesel that was brought out was in production, and had been for nearly two years at that time, replacing two former units of cost, and the original Diesel, was comparable equipment?

Mr. Wagner: That is the question.

The Court: Yes. That is still in the case.

Mr. Wagner: That is a point of argument.

The Court: Yes.

Mr. Wagner: But I would appreciate ascertaining what the [59] differential is in order that we do have a factor.

The Court: Now mind you, this company had gone out of production of the gas unit. It had gone out of production of the original Diesel unit as of the time of the sale of this condition. It had only in production at that time a full Diesel unit, a more expensive in every way unit than the two former ones, but that was the only unit new that it had in production at that time. Now that is what the question bears down to. Now does this man get the benefit of that fact, that the only comparable unit being produced new at that time was considerably more expensive than the one that he sold? Mr. Joy, I see, was going back to October, 1941.

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: Well, I would like to—of course, this may be subject to objection but I would like to ask the witness what the comparable full Diesel type of equipment, what its price was as of the same date that this particular equipment was new?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial.

The Court: I don't think they were in production. I don't think their production overlapped.

The Witness: Not when the WKO was in production, no.

Mr. Wagner: Q. During any period was there any period of time wherein an ignition oil-burning piece of equipment was [60] being produced at the same time as was a full Diesel piece of equipment, where the only difference in the two pieces of equipment would be the motor?

A. Not with our firm.

The Court: It is not likely a manufacturer would do that. You know how they are?

Mr. Wagner: Yes.

The Court: They get a new model over here in the automobile business and they just produce that model, and other equipment people are inclined to do the same thing. That is basically to replace the unit.

Mr. Wagner: Q. What date was the change made by the Allis-Chalmers people in the manufacture? When was the change-over made from one type to another?

(Testimony of Claude Byron McQuiston.)

The Court: He brought ou the full Diesel in September, '41. That is the first price he has on it.

A. I haven't got the exact dates or records here with me. It is just according to my memory.

Mr. Wagner: Q. In September of 1941, but you did have——

A. I do have a price list on it here for that year.

Q. For 1941? A. That is right.

Q. And during that year was any production made of the oil-burning things at all?

A. No. [61]

Q. When did that cease? Approximately when did you cease production of the oil-burning type of ignition equipment?

A. I believe it was around '39 or '40 sometime.

Q. Generally speaking I understand, Mr. McQuiston, that there is a difference as far as ceiling price, or cost of production, between the two types of equipment, oil-burning ignition type, on the one hand, and full Diesel type, on the other. There is a difference; is that right?

A. There is in our case.

Q. Generally speaking, can you say how expensive that difference is?

A. I only have the one experience here going into this new full Diesel. About \$1200 difference in the price, approximately.

Q. But that was for different periods of time?

A. No. From the time it came out. I think it was around the same price when it came out. You have more tractor.

(Testimony of Claude Byron McQuiston.)

Mr. Wagner: I thing that is all.

(Witness excused.)

The Court: Let's take a recess anyhow for ten minutes, and try to get through this afternoon.

(Short recess.)

Mr. Joy: The plaintiff rests, your Honor.

Mr. Jaureguy: Call Mr. Trullinger. You want to put that [62] in evidence, don't you?

Mr. Joy: Yes. If your Honor please, may I reopen my case long enough to substitute the original bill of sale for the copy which is now in evidence?

Mr. Jaureguy: I think he means he wants to offer this in evidence. He and I have been talking about this procedure and I may have misled him by thinking when I handed something in at pre-trial it was in evidence, but I didn't intend that is the rule, and I didn't mean to mislead him.

The Court: It is admitted.

(The bill of sale to L. G. Trullinger, dated April 7th, 1943, was thereupon marked Plaintiff's Exhibit 1.)

PLAINTIFFS' EXHIBIT No. 1

BILL OF SALE

L. G. Trullinger to Earl Gilmore.

Dated....., 19....

Know All Men By These Presents

That I, L. G. Trullinger the party of the first part, for and in consideration of the sum of Ten and

No/100 and other Valuable Consideration Dollars, to me in hand paid by Earl Gilmore the party of the second part, the receipt whereof is hereby acknowledged, do....by these presents, bargain, sell and deliver unto the said party of the second part, his executors, administrators and assigns, all of the following described personal property, to-wit:

One Allis-Chalmers Tractor Serial No. WKO3982 Motor No. 8949. Together with armor—Bull hook and Miscellaneous Parts & Wrenches

To have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever.

And I hereby covenant with the said party of the second part that I am the lawful owner..of said goods and chattels; that they are free from all incumbrances that I have good right to sell the same as aforesaid, and that I will and my executors and administrators shall warrant and defend the title thereto unto the said party of the second part, his executors, administrators and assigns against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, I have set my hand and seal this 7th day of April, 1943.

Executed in the presence of:

..... (Seal)

..... (Seal)

I, L. G. Trullinger being duly sworn, depose and say that....the sole owner..of the property described in the foregoing bill of sale, and that the

same is free and clear of liens and encumbrances of every kind and nature, at the date of execution of said bill of sale, and the same have been paid for in full.

L. G. TRULLINGER

Subscribed and sworn to before me this 7th day of April, 1943.

[Seal]

ESTIS L. MORTON

Notary Public for Oregon.

My Commission Expires

Oct. 4, 1943

State of Oregon,

County of Hood River—ss.

Be It Remembered That on this 7th day of April A. D. 1943 before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named. who is known to me to be the identical individual described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal]

ESTIS L. MORTON

Notary Public for Oregon.

My Commission Expires Oct. 4, 1943.

DEFENDANT'S EVIDENCE

L. G. TRULLINGER,

the defendant, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Jaureguy:

Q. Will you give us your name, please.

A. L. G. Trullinger.

Q. And where do you live?

A. The Dalles.

Q. And what is your occupation? [63]

A. I am in the lumber business.

Q. At the Dalles? A. That is right.

Q. And in April, 1943, what was your occupation. A. I was in the lumber business.

Q. And where were you then?

A. I was working at Hood River, and my mill, my sawmill, was in Hood River County. My planing mill was at Moser, in Wasco County.

Q. Do you remember the occasion when you sold a tractor to Mr. Gilmore? A. Yes, sir.

Q. And from whom did you buy that tractor?

A. Oh, I bought it from a farmer by the name of Echelbery, in Eastern Oregon.

Q. Do you know whether he had had it on his farm?

A. Well, it is my understanding he had. He had a farm at that time and he had used it at that, so he told be but I had never seen it there.

(Testimony of L. G. Trullinger.)

Q. And is that the kind of a tractor that could be used on a farm?

A. Oh, yes. It had been used on a farm prior to the time I bought it, or prior to the time I used it on my job. I didn't use it on my job to start in with, but he came up there and he was there with it.

[64]

Q. And what did you use it for?

A. I used it for logging.

Q. And did you do anything by way of altering it or repairing it? A. Oh, yes.

Q. What did you do?

A. Oh, the machine had new pistons, rings and wrist pins. Now that was put in in '42.

Q. Tell us what happened in '42, first. Yes.

A. In '42? Well, we got ready to start the mill again. You see, this was a seasonal operation. When the weather got bad in the hills we were unable to log, being as we were on dirt roads, and then in the spring we went through the machine; we put in new liners, the cylinders, that is piston rings and wrist pins, and line-boarded the machine, overhauled the fuel pump, and it had a Diesel bush, a Diesel pump on it. We put the fuel and the cylinders through in each case, the sums paid and the people, and, oh, there was considerable other work. I have the bills there for the parts, which approximate \$500.00, I would say.

Q. Yes. Then after you put those repair parts in, in 1942, how much did you add to the machine?

A. We got four hundred thousand feet of lumber

(Testimony of L. G. Trullinger.)

that season. We were short-handed and we broke down quite a bit in the mill and we got a very late start. I run the planing mill, [65] oh, up until July sometime, and then we didn't go up in the woods until—well, it was that month—until the month of July, and we could only run the mill about half time with a skeleton crew and we logged part of the other time. We probably actually used the tractor that had been pulling steady, I would say, around maybe thirty or thirty-five days in actual use; that is, in steady, actual use of a regular working day.

Q. And did you use it any in 1943?

A. No, we didn't use it any in 1943. We took it out of the woods in October and took it down to the planing mill, where we stored it during the winter, and I was pretty well cut out up there. That is one reason the stuff was scattered. It was hard to get it. That is why we made a poor showing that year, and I didn't use it at all in 1943.

Q. So after you put all of these parts in 1942 you used the tractor to what would be equivalent you think to thirty days?

A. I would say somewhere around that; thirty days; it might have been thirty-five days; it might have been even forty days, but it was very little use.

Q. Now I want to hand you a list of invoices and bills and ask you whether that is a correct list of your bills and invoices that you put in in 1942?

A. That is right.

(Testimony of L. G. Trullinger.)

Mr. Jaureguy: We will offer that list of invoices and [66] bills in evidence, and we have attached to it an adding machine computation and we ask that that go in just for the convenience of Court and counsel.

Mr. Wagner: They are objected to, your Honor, on the grounds that they are incompetent, irrelevant and immaterial, and have no bearing at all upon the issues as to the determination of the price.

The Court: They are admitted, subject to the objection.

Mr. Wagner: Exception.

(The eighteen sheets, consisting of bills and adding machine tape, so offered and received, were marked Defendant's Exhibit 2.)

Mr. Jaureguy: Q. Then in 1943 did you do any more parts in it or on it? A. Yes, we did.

Q. What did you do in 1943?

A. Well, we put on a new set of tracks. The others were still in service but we were afraid of breakdowns, they were getting worn, and we put in—we had the rollers built up on the other side of the cat, and new bearings, and shoe shafting and the frames that held them were all put in new. There was a new—oh, the bottom half of the matter; I don't know whether they call it crankcase or oil pan—no; it was part of the block—it was put in new, and the cat was [67] completely gone through. We went through every bearing in it, and in the transmission and the rear end, and it was around

(Testimony of L. G. Trullinger.)

\$500 worth of parts alone put in at that time, and it never turned a wheel.

Q. I hand you here another list of invoices and bills and ask you if they were the parts that went into it in 1943?

A. Two or three of these that were offered for some of the parts that were shipped to us, but they are the parts. Some of these are for machine shop work. They are not all actual parts, but they are rather small items. There is one four and a half, another one a dollar and a half.

Q. What is that? Machine shop work?

A. That is the machine shop work by Howell Brothers at Hood River, and they are the ones that also built up the rollers, took one side of the tractor. Here is one for \$28.00. That was for building up rollers that were put back into the machine after they were built up and turned down again. Here is one to build up a machine wheel for four and a half. They were just repairing little parts, those particular ones. I think the rest of them were all new parts. Yes, sir.

Q. Now what about the tracks? Are they in there?

A. The tracks are not in there. I could not find the invoice on those, and I am not just sure what they cost. If I remember right, they came around \$250, but probably Mr. McQuiston over there could give us pretty close on that, including [68] freight.

(Testimony of L. G. Trullinger.)

Q. He has given us some figures there, which I think are a little more than yours.

A. Now that tracks is the rails, pins and bushings, and it does not include the house or shoes. They were the old shoes put back on again.

Q. But your recollection is that you paid for the tracks in 1943 about \$250?

A. Including freight.

Q. Including freight?

A. Now I might have been off ten or fifteen dollars on that.

Mr. Jaureguy: We will offer this next one he has given, including also an adding machine computation. At the end of the adding machine computation we have added \$250 to represent the tracks.

Mr. Wagner: I wish to object to the introduction of these upon the same ground; also wish to move to strike all of the testimony of the witness pertaining to replacement or repairs, and the amounts that the witness has indicated.

The Court: The motion is denied and the exhibit is admitted, subject to the objection.

Mr. Wagner: Exception.

(Thereupon the 27 sheets, consisting of bills and adding machine tape, so offered and received, were marked [69] Defendant's Exhibit 3.)

The Witness: Now that didn't include labor.

Mr. Jaureguy: Just a minute.

Q. Now your testimony there shows that in 1943

(Testimony of L. G. Trullinger.)

for new parts that you installed on the machine of some small items of labor that you recounted there it runs about \$500.00, but what about the labor for the other labor for installing parts?

A. Well, there are no bills for that either. The man that did the installation and the work was one of my regular employees.

Q. And what would you say would be that amount? And did you do any of the work yourself? A. Yes, I worked on it myself.

Q. And what would you say would be the reasonable value of the labor that was put in there by your man and yourself to put those parts in?

Mr. Wagner: The same objection.

A. Oh, I would say four or five hundred dollars.

The Court: The same ruling.

Mr. Wagner: We save an exception.

Mr. Jaureguy: Q. I didn't get your answer?

A. I would say four or five hundred dollars.

Q. Since you put those parts in in 1943 did you use the tractor at all? [70]

A. No, I didn't use it at all.

Q. And what did you do with parts that you took out of the tractor?

A. They were sold to Mr. Gilmore when he bought the machine.

Q. Now how did you happen to sell this machine?

A. Well, I bought The Dalles Mill & Lumber Company, which is a much larger operation, and I needed a larger tractor to supply logs for the mill.

(Testimony of L. G. Trullinger.)

Q. Well, I wish you would kind of elaborate on that. By that, do you mean that this tractor is all right for certain types of sizes of logs but not all right for other sizes?

A. Yes. The larger the log the more weight you must have in your tractor to pull it, and the larger the tractor the larger number of logs you can pull with it at one turn, and I jumped from a mill that was cutting around 15,000 a day to one that was cutting around 35,000 a day; that is, that is what we did cut with it, and I had to have more logging equipment and I did buy a larger tractor. I also needed a bulldozer, which is a part of a tractor, and I bought that.

Q. Well then, you had yours up for sale and Mr. Gilmore learned of it, I take it, and came up to see you?

A. That is right.

Q. And just tell what happened after you met him with respect to this equipment?

A. Well, he came there with Mrs. Gilmore and his son and I [71] explained to him what we had done to the tractor and he took it, and his son did, and drove it around in the yard, and I—he said he would go back and make arrangements to buy it, and a few days after that he come back and said he would take the tractor, and he loaded it on his logging truck and he went to the—told me to meet him at Hood River at the bank and he wrote out a check for the tractor and we wrote out a bill of sale there at the bank.

(Testimony of L. G. Trullinger.)

Q. What did you tell him with respect to any guarantees with respect to anything in connection with it?

A. Well, I told him that the parts were guaranteed.

Q. Quaranteed by whom?

A. By the factory, and we would stand back of our relationship, but as to satisfactory performance we told him that we would even do that by paying out the full 85 per cent.

Mr. Wagner: I don't understand.

A. He said he would rather have the cat that way, the way it was, and not pay the difference.

Mr. Jaureguy: Q. Well, how did you arrive at this figure of \$2800 under the ceiling price?

A. Well, that is, the cat, they told me when I bought it, cost forty-four hundred dollars.

Q. Yes; told you at Hood River, I take it?

A. That is, well, it was over in Eastern Oregon Some place.

Q. Yes. [72]

A. And it wasn't a new cat. It was an as-is cat; and this was a thoroughly rebuilt tractor, and the—the fact is, I asked \$3000 for the cat and Mr. Gilmore offered me \$3000 for it with a thousand dollars down, but I told him that I didn't care to sell it that way, and I told him I would knock off \$200.00, so he could go to his bank and discount the paper, that is the two thousand dollars balance, and I would stand that two hundred dollar loss, and he came back—and when he came back a few

(Testimony of L. G. Trullinger.)

days afterward and told me he had gone to his bank and they had loaned him the money and he didn't have to stand any of the loss, that they had loaned him the full amount.

Q. I see. You sold it to him for the full twenty-eight hundred?

A. For the full twenty-eight hundred dollars.

Q. But you had figured the amount, in figuring out the possible ceiling price you figured the cost new in Eastern Oregon?

A. Well, I didn't figure it as an as-is tractor.

Q. No, no. You are going too fast. First, I want to find out what you started in at, whether it was the same price asked in the East, the Middle East or Middle West, or whether it was the same price in Oregon.

A. Well, we figured the cat at forty-four hundred dollars. That is what the man told me it cost when I bought it.

Q. Yes. That is, you understood that that cat sold in Eastern [73] Oregon for \$4400 when it was new? A. Yes.

Q. Then you took the new parts that you put in. You put in \$500.00 of parts?

A. Well, it was practically a thousand dollars of new parts in that machine, but some of them had been used a short time but not much over thirty days.

Q. That is, the parts that had been used thirty days were about \$550 worth? A. Yes.

(Testimony of L. G. Trullinger.)

Q. And the parts that had not been used at all was about five hundred five worth, and you took that into consideration, and your labor for installing them?

A. Well, that should have been way under ceiling price in actual value of the machinery.

Q. I know, but what I am asking you is this: Are those the things you took into consideration in determining whether you were way under the ceiling price?

A. That is right.

Q. Yes. That is what I am trying to get at. Now this bill of sale that—you have seen this bill of sale in evidence, and that is your signature on it?

A. That is right.

Q. That says, "One Allis-Chalmers Tractor", and it gives the serial number, and it says, "Together with armor, bull hook [74] and miscellaneous parts and wrenches." I want you to tell us about the armor, the bull hook, and the miscellaneous parts and wrenches.

A. Well, the armor I had made by Howell Brothers in Hood River, and then there was a bumper on it; that was a piece of railroad iron; and the bull hook is a hook that fastens—that goes into the drawbar of the machine where they hook the cables; that is, the choker lines.

Q. Are those part of the tractor when it is all new?

A. No, no. They are accessories.

Q. All right. Then tell us about the miscellaneous parts and wrenches.

(Testimony of L. G. Trullinger.)

A. Oh, there was a big grease gun. I think they cost around thirty-five dollars, that they use for greasing the tractor rollers. Then there was a smaller grease gun that is used on Alemite fittings. And the wrenches, I don't recall what they were. They were wrenches that they used on the machine, or a part of it. I don't imagine they amounted to a great deal. I think they come with the machine.

Q. Well, what about any other parts for the machine?

A. Well, there were these tracks which were worn. We didn't want to use them but, nevertheless, they——

Q. You mean the tracks on the machine or that were not on?

A. The tracks that were off the machine.

Q. They had been on? [75]

A. They had been on. We had just taken them off.

Q. Yes.

A. Then there were the idlers. There was this crank, this part of the motor block that was together. There was the old one. It is there. All of these things are there yet at Moser. He didn't take them; they are there. They are his.

Q. That is, you sold them to him? A. Yes.

Q. And all of those things were included in the \$2800 price?

A. That is right; and he understood it that way, too.

(Testimony of L. G. Trullinger.)

Q. Yes. That is, you discussed it with him?

A. Yes, we did.

Mr. Jaureguy: You may take the witness.

Cross Examination

By Mr. Wagner:

Q. Mr. Trullinger, at the time of this sale did you understand that in order to command an 85 per cent price that there had to be and attendant with the sale a bond and guarantee of satisfactory operation for a period of not less than sixty days?

A. Oh, I didn't know about, you know, how many these regulations are. I have a pile of them that thick.

Q. You knew there was a guarantee there, though?

A. Well, I have heard that. I didn't know it but I have heard [76] it.

Q. And you knew that at the time you made the sale?

A. Yes, I had heard it.

Q. Did you at the time of making your sale refuse to give that kind of a guarantee?

A. No. I said that I would for 85 per cent of the forty-four hundred.

Q. For 85 per cent of \$4400?

A. Yes.

Q. You would give such a guarantee?

A. Yes.

Q. But in this case you didn't give any guarantee?

A. That is right. I didn't get that price.

Q. Didn't give any bond and guarantee at all?

A. Which?

(Testimony of L. G. Trullinger.)

Q. You gave no bond and guarantee at all?

Mr. Jaureguy: Well, he has testified to what guarantee he gave. If you want to call that one or not it is a conclusion. I think it is better for him to ask the witness what he said; then it is a regulation matter whether there was a bond and guarantee or not. I think it is obvious that he gave one but it wasn't at the time.

Mr. Wagner: To begin with, we say——

Mr. Jaureguy: I know, but what I am objecting to is his question. [77]

Mr. Wagner: O. K. I will withdraw the question.

Q. What did you say in connection with a guarantee?

A. Well, the parts are guaranteed by the manufacturers and if there was anything that was defective on those, that we would see that they made good on them.

Q. O. K. What else did you say, if anything?

A. Oh, if there was anything particularly wrong with our relationship let us know and we would make it right. But we——

Q. Did you give him any other writing in addition to the bill of sale? A. No.

Q. That is the only writing that there is in the case?

A. Well, I told him if the thing was put together properly, we had worked on it and the man that had worked on it was a competent man, and

(Testimony of L. G. Trullinger.)

they were Allis-Chalmers parts, and the Howell Brothers were capable men to do the work that was done.

Q. How did you arrive at the figure of \$3,000 that you thought to be the ceiling price on this?

A. Well, that was just——

Q. What items did you take into consideration?

The Court: Well, it is not an as-is machine. The machine was a rebuilt machine.

Mr. Wagner: Q. Well, tell me when you arrived at the three thousand dollars. I understood your testimony you gave a discount of \$200. [78]

A. That is right.

Q. From the \$3,000. A. That is right.

Q. But you arrived at the \$3,000 by some process of figuring up ceiling prices; is that right?

A. Well, oh, just about the way tractors were selling for, and the condition of this machine, why, it was just a price that we put on it.

Q. You ascertained—you testified that you ascertained the price new?

A. We figured that a lot less than a regular ceiling price.

Q. What ceiling price did you figure?

A. Well, the machine cost delivered forty-four hundred dollars.

Q. Yes; and you took 55 per cent of that; is that right? A. No.

Q. Or did you take 85 per cent?

A. 85 per cent of \$4,400 ran it——

Q. You took 85 per cent?

(Testimony of L. G. Trullinger.)

A. ———way up over \$3,000, and I knew that was a lot more than the machine was worth.

Q. You took 85 per cent of the forty-four hundred?

Mr. Jaureguy: He said he didn't.

A. No. I didn't take 85 per cent.

Mr. Wagner: Q. I mean the first step.

A. If we had 85 per cent of \$4,400, it was a lot more than \$3,000.

Q. Did you figure that way? A. No.

Q. Did you consider that price 85 per cent?

A. I talked about 85 per cent.

Q. You talked about it? A. Yes.

Q. Did you take 55 per cent of \$4,400?

A. No.

Q. You didn't do that, either?

A. Because we didn't figure it an as-is machine, and that wouldn't apply to a particular machine like this.

Q. Did you know that the block in the machine was cracked when you delivered it to Mr. Gilmore?

A. No; and I don't know it now, either; and, as a matter of fact, I know the block wasn't cracked when I delivered it to him, because I had operated the machine and we had verified it and it was not cracked.

Q. You testified as to the armor you put on after you had it? A. Well, I had it put on.

Q. Well, you had the machine? A. Yes.

Q. How about the bumper? Was it already on there?

(Testimony of L. G. Trullinger.)

A. Well, we had one on the machine that we broke off, but that was one my man put on. [80]

Q. This was a replacement?

A. Yes. We didn't put it on. It come on it.

Q. How about the bull hook?

A. We had that made in Hood River.

Q. You had that made additional?

A. Yes.

Q. After you got it? A. No.

Q. You didn't put it on? A. No.

Q. How about the grease gun? Did that come with the machine?

A. That came with the machine.

Q. Both of them?

A. No. One of them I bought.

Mr. Wagner: I think that is all.

Mr. Jaureguy: That will be all. Thank you.

(Witness excused.)

Mr. Jaureguy: Defendant rests.

REBUTTAL

EARL GILMORE

was thereupon recalled as a witness in rebuttal in behalf of the plaintiff and, having been previously sworn, further testified as follows: [81]

Direct Examination

By Mr. Wagner:

Q. Did you hear Mr. Trullinger testify that at

(Testimony of Earl Gilmore.)

the time of this sale or delivery of this tractor to you that he told you that all the parts were guaranteed by the factory?

A. I did not hear that.

Q. Did he indicate to you that under any circumstances he would give you a price guaranty?

A. No, sir.

Q. For performance of the machine?

A. He did not under any circumstances, no.

Q. What did he say, Mr. Gilmore?

A. He said that the price wasn't right to guarantee it; that there wasn't enough money to guarantee it, and that, therefore, he wouldn't; and at the time I bought the cat we tried it out. It run on three legs and three cylinders.

Mr. Jaureguy: That is not responsive.

Mr. Wagner: Q. Did you discuss ceiling prices at the time you took delivery?

A. Yes. I asked him if he was within the price list, and he said he was.

Q. Did you discuss Office of Price Administration ceiling prices? A. No, I didn't.

Q. You didn't. Did Mr. Trullinger quote a figure of \$3,000 [82] to you?

A. Yes, he did. He quoted the figures in this way, and then finally I kept thinking that was too high and he said, "Well, being as the condition that it doesn't run just exactly right, why, I will knock off two hundred dollars if you will pay me cash." And I said, "Well, I will let you know by tomorrow sometime"—that would be the sixth of

(Testimony of Earl Gilmore.)

April, it was—"whether I will take it or not," which I called him up finally. Me and the boy decided that it was O.K., we would go back and take it.

Q. You paid cash then? A. I did.

Q. And got it for \$2,800?

A. And I didn't borrow the money, either, as Trullinger said.

Mr. Wagner: I think that is all.

Cross Examination

By Mr. Jaureguy:

Q. That is, as I understand it, he said that this price of \$2,800 wasn't enough to justify him in giving you a full guarantee?

A. That is right. That is what he said.

Q. If you wanted a full guarantee it would have to be more? A. Yes, that is right.

Q. Yes. And then he told you, I take it, that that machine had a lot of new parts in it? I think you have already [83] testified to that.

A. It possibly had some new parts. I don't say all of them could have been; lots of them; because there are not too many parts in a cat.

Q. That is, they were not all new?

A. No, they were not all new.

Q. Some of them had been put in the year before? A. Possibly.

Q. And he told you that he believed that it was well within the ceiling? A. Price.

Q. In doing so he discussed the new parts that had been put in?

(Testimony of Earl Gilmore.)

A. Well, no, he didn't discuss all of the new parts. He had built up some of the rollers, the track rail, which was very poorly built up. They were not ever turned down; they were built up—never returned down on the lathes in any way.

Q. You didn't think so, eh? A. Huh?

Q. I say, you didn't think they were?

A. I knew they weren't.

Q. You noticed that before you took it?

A. I did.

Q. Yes.

A. Although they were new rails. [84]

Q. New track?

A. They were new rails, yes.

Mr. Jaureguy: Yes. That is all.

(Witness excused.)

Mr. Wagner: That is our case, your Honor.

The Court: Argue.

Mr. Joy: If the Court please, the defendant has admitted that he did not guarantee this tractor as in accordance with the Regulation, M.P.R. 136, and did not give an invoice, which is also required by the regulation, and for the plaintiff's part of the case Mr. Gilmore has testified to the condition of the tractor, which was unsatisfactory from the start and ended up in the condition where he had to quit that particular job and sell the tractor. And as to the ceiling price of the machine as it was sold at \$2,800 it is the plaintiff's position that you should take the nearest comparable tractor and

that that should be the WK model, which was in production in 1941 and sold at that time at \$2,800—\$2,880—and it is our position that that was the frozen ceiling price as of October 1st, 1941, and that that ceiling price holds. The main reason for that is that it certainly is not a very nearly comparable tractor, when you bring into the picture a Diesel at a much higher price and a different motor, quite different—entirely different, really, because this tractor that he [85] bought was not a Diesel motor. The tractor that Mr. Gilmore bought was not a Diesel motor.

The Court: Well, you have to separate the questions. I hope it does not but the war may last ten years, as I said a while ago, and the first question you have to figure is whether or not ten years from now if the war is still continuing and if a man sells a piece of equipment it is compared to the comparable price in 1941. If in 1951, should the war unfortunately be continued, and the OPA forced to be continued, to work indefinitely and the OPA definitely in 1951, then will we go back ten years and find some comparable piece of equipment to compare it with what was sold in 1941?

Mr. Joy: Well, if anything, it certainly would not be more, your Honor. It would be less, due to the depression. But it could not exceed that ceiling price. Under the OPA regulations, your Honor, it can always be sold less than the ceiling, but in no event over. It is our position that this machine—I refer to the WK model—the ceiling price of \$2,880 is the nearest comparable machine and should

be used in the manner in which the regulation prescribes as the nearest comparable machine, and to be used as a guide in the pricing of this machine and not more than that—in any event not more than that. The defendant did not guarantee this machine, as I have said, and did not comply with M.P.R., Maximum Price Regulation 136, and the sale of this tractor exceeded the [86] ceiling as outlined in our complaint, and the Office of Price Administration claims that we are entitled to treble damages for the overcharge.

I don't think of anything else.

Mr. Jaureguy: Is that your argument?

Mr. Joy: Yes.

Mr. Jaureguy: Of all three of you? I am very sorry that they didn't argue at length, your Honor, because, as I said in my opening statement, there are other problems here that are involved and I really would have liked to have their views on it. They have stated that the M.P.R. 136 applies but they haven't pointed out to your Honor exactly why it applies, nor the particular provisions of it that they claim were violated in this particular case.

I have also said to your Honor, and we have argued here purely that this is a case where the person who purchased it was an ultimate user or consumer and he did not purchase it for use or consumption in the course of trade or business; and I have told your Honor there were decisions both ways on that point. I want to argue all of these points. I don't think I would be doing my duty to my client if I just took the arguments they have

given us and answered them, without going into those other points, so I have just got to start fresh on these and I will do that, and I hope that I am not too tiresome when I do it. [87]

Now I think we have two of the regulations, and I would like to get the one that is in evidence, then we can each have one. There are three points in these regulations that I wish to discuss, but I wish to discuss one of them first, then go on to the argument from the rest as to the meaning of the law, and then go back to the regulation, and that is one of the points that they have discussed. I wish to address myself to that, and that says, "The price"—and I am reading now in this exhibit that has been introduced, which contains Regulation 136, and I am reading Section 1390.11, subdivision (c) of that M.P.R. 136:

"The price for any other secondhand machine or part shall not be more than 55 per cent of the highest maximum price to any class of purchasers for the nearest equivalent new machine or part f.o.b. factory, whether established by this Maximum Price Regulation No. 136, or something else."

Now I take it that the burden is on them to prove that the price here was in excess of the maximum price that is set by this regulation and in order to show that it is above that they must show what the price new——

The Court: I wonder if that gentleman wants to get away. I wonder if any of these people want to get away. Sometimes witnesses don't understand when they can go.

Mr. Jaureguy: Yes. You understood you didn't have to stay unless you wanted to. [88]

Mr. McQuiston: Oh.

Mr. Jaureguy: And at the time this sale was made I am not going into an argument unless your Honor cares to have me, as to whether a gasoline engine tractor is the nearest equivalent to a Diesel engine, because I think your Honor has already stated, which I think is certainly sound, that the one that they were then in April, 1943, selling as the nearest equivalent is the one which is the nearest equivalent. I think that is very clear. The f.o.b. factory price on that was \$4,250, without any additions. Then there were several additions here we have been talking about, and in this case there were no parts which were put into this machine which were not secondhand parts. Whatever you want to say, as to whether this was an as-is agreement, or partly guaranteed and partly as is, there were no parts——

The Court: Where is that portion found?

Mr. Jaureguy: As is, I think—well, I got it from Mr. Joy and I think he got it from the Act. No, it is not in the Act. The Act——

Mr. Joy: It is in the Act.

Mr. Jaureguy: (e); yes.

The Court: Well, it will turn up.

Mr. Joy: It is used in connection with as is with reference to dismantling.

Mr. Jaureguy: That has to do with dismantling. I was [89] using it I guess, not in connection with the Act but I would say as distinguished from either

a new one or a guaranteed one; that is, this was a machine in which he had put in new parts and the new parts had never been used. The parts themselves cost him \$500, and the labor to put them in was worth, according to the testimony, another \$500, and he sold this machine, with the new parts in it, together with the old parts that had been taken out for replacement, and together with the wrenches, bull hook, and the guard, and these other things which there has been some testimony about, one of these items I think there is no testimony whatever—and they were all sold—where the nearest equipment, without these extra parts, was \$4,250, and the whole thing was sold for twenty-eight hundred, which would be 55 per cent of \$5,100; so we say that even though this regulation applies, to which I am going to refer later on, he was as he himself explained it well within the ceiling. I am going to come back later to this regulation to raise the question whether this regulation applies to this sale at all then in circumstances——

The Court: Well, it wasn't even 55 per cent of \$4,250?

Mr. Jaureguy: That is right. It wasn't even 55 per cent of \$4,250. It was, however, well within 55 per cent of that, plus the materials that went in, which were new materials and those that had been used thirty days, and the labor to install them; it was well within that. I haven't figured out here [90] what 55 per cent of \$4,250 is.

The Court: \$2,337.

Mr. Jaureguy: Yes.

The Court: \$462.

Mr. Jaureguy: Yes. And then there were new parts that were testified to, that they admit. As I understand it, they admit there were additional parts, the bull hook, and the armor, and two or three things of that kind.

Now I want to discuss these other questions before I come back to this regulation, and that is whether the Administrator of the Office of Price Administration has an action at all, because I think I can say that most of the Courts that have passed on it, either by way of decision or dictum, have said that in a case of this kind the Administrator does not have the action. I mean, didn't have it prior to the amendment with which we are now concerned, because I think everybody agrees that that amendment is not applicable here. The Act was amended last summer and one amendment was made retroactive and one was not made retroactive. The amendment that was made retroactive was the amendment which gives, your Honor, the discretion to enter judgment in any amount not greater than three times, instead of not giving your Honor that discretion.

"If any person"—and this is what the statute says—"If any person selling a commodity violates a regula- [91] tion or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action."

And then it says, "In any case where the purchaser cannot bring an action the Administrator may bring it, and if the purchaser bought for some use or consumption other than in the course of trade or business the purchaser may bring the action."

As I say, I am sorry they haven't argued that point, but I just feel that I have got to, because it seems to me it is in point here. And I may say the Courts have several times remarked upon the ambiguity of what that means. Some have said if that meant to include a type of case such as this they could not have said trade or business; they should have said trade, business, occupation or profession, which is a very common expression when you wish to cover anything that is used for a person in his livelihood, trade, business, occupation or profession. But they didn't do that. They said, "Who did it for use or consumption other than in the course of trade or business." It is our contention here that that expression, that a person purchases for use or consumption other than in the course of trade or business, means that a person who buys it for use or consumption other than for purposes of resale. Trade and business are both expres- [92] sions that are very often used in the business of buying and selling. In fact, the original meaning of trade—it has taken on lately other incidental meanings, but the original meaning of trade was barter back and forth, and trade in business is an expression which is very often used to mean the price of buying or selling, and when you get down

to the reason for the rule, or the reason for the distinction, it is this: That when a man bought something, as some of these authorities point out, when a man buys something for resale there are one or two situations that may exist, and very often both. Usually he is *particeps criminis* with the seller. They are both in the position where they are engaged in that kind of business and, therefore, they normally expect them to know the regulations. And so most of the time where a retailer pays a wholesaler more than the price ceiling he does it knowingly and voluntarily, and, therefore, we should not give him the right. And the other reason for the rule is that many of the price ceilings that a retailer sells are based on the prices he pays, and that a retailer buying under those circumstances would very often, if not always, pass on the price ceiling to his consumers; and so he should not be permitted to get for his own use treble damages from the man that sold it to him. But when you come to the ultimate consumer, whether it is a farmer buying a tractor to use on his farm, or somebody else using something for his business, a [93] lawyer buying a desk for his office, if you want to go that far, or a man buying, as one of these cases points out a man buying a tractor for the purpose of beautifying an estate for himself, or whether he uses it in livelihood or not, there is no reason one person, the person who buys for his own use and without the intervention of making any profit out of it, why he should have the right and the other man not have it. So this type of situation has been

before the Courts I think six or seven times. One of the earliest cases, which I think went too far, is strongly in my favor, but I don't urge it upon your Honor as being a sound case because I just don't agree with the reasoning of it, as has been pointed out by other Courts. But, nevertheless, I want to call your Honor's attention to it, because it is referred to in later cases, in which the later cases follow the exact line of reasoning I have tried to outline to your Honor, and that is it is only the man who buys for wholesale who is not permitted to bring the action for treble damages, and the man who buys for his own use and is the ultimate consumer and should be permitted to, whether he is going to use it in some occupation or whether he is going to use it as an ultimate consumer and not in any occupation.

In this case it was an action against some retailers who had bought—no, I beg your Honor's pardon. This was an action against those who had sold the retailers. In other [94] words, the purchase was for the purpose of resale. No; I am wrong on this now. I am sorry. I thought I had that in mind. No, I don't think they were retailers. I think they were those who got it for their own use. No; I think I will go back to my original.

The Court: It can't be a very good headnote.

Mr. Jaureguy: No, the headnotes are not. I am not even sure that it points out what it was for. Anyway, I want to read what the Office of Price Administration in arguing this case to the Court claimed this case was.

The Court: What Judge wrote that opinion?

Mr. Jaureguy: This was Judge Hall, in Los Angeles.

The Court: Yes. That is on appeal.

Mr. Jaureguy: I learned in reading the cases to your Honor that this case was on appeal, so I got service. I wired down two or three days ago to the Clerk and the Clerk wired back that it had not yet been decided. The opinions I get are anywhere from three to six weeks late, and I was afraid I would come in here and they would spring an opinion on me, and I didn't like to take that chance. Anyway, this is what the attorneys for the OPA were contending:

"It is the contention of the attorneys for the Administrator that a person who buys a commodity at retail may bring an action for treble damages, but that the retailer, who has had to overpay his wholesaler or producer, cannot [95] bring such an action, and that such right belongs exclusively to the Administrator"—just exactly what I am contending here. "The result of this contention is to say that a person paying 10 cents extra for a small sack of sugar at retail can bring as much of it, \$50.00," and so on, but the retailer, who has bought for a thousand dollars, cannot sue for three times. That is what I am contending, too.

"This is so, say the attorneys for the Administrator, because the retailer's purchase of the sugar is 'in the course of trade or business,' and that the retailer's sale to the consumer is 'other than in the course of trade or business.'"

That is just exactly the contention I am making here, is the contention that the attorneys for the OPA were making to the Court in this case.

Then they go on and point out why the retailer should not be permitted to bring an action. "Such construction and its results are unjust in those permitting a squeeze to be made upon a wholesaler so as to put him out of business or induce him to break the law," and so on.

"The literal meaning of the language under discussion produces a result which is likewise unjust. The Act says an individual can sue if he buys something 'other than in the course of trade or business.' " Well, I disagree with the Court. The Act does not say that. The Act says, not if he buys within the course of trade or business; it [96] says if he buys for use or consumption other than in the course of trade or business. "As just indicated, when a person buys something at retail the sale is made 'in the course of trade or business,' just as much as when a retailer buys from his wholesaler, so, if an individual," and so on.

And the Court finally concludes as follows: "My view of the correct situation of law as I announced from the bench: The right to sue for treble damages against anyone regularly engaged in business who has overcharged, either as a producer, wholesaler or retailer, is exclusively the right of the individual or concern having to pay the overcharge, and the Administrator has no right to sue in such instance, but is limited in his right to bring actions for treble damages to suits against blackmail oper-

ators and bootleggers and others not regularly engaged in business."

Now I have called your Honor's attention to that case, not because I want your Honor to follow it, because, as I say, it has been criticized by later cases, but for two purposes: First, to call your attention to the fact that the attorneys for the OPA in this case were making exactly the argument I am making here; that is, that the line of demarcation is whether or not the person who purchased it was for the purpose of acquiring it or for the purpose of his own examination; and the second reason is [97] so when you examine some of these authorities that criticized it we may know just what they are talking about and know that all authorities that criticize it are not hard fashioned here but some of them are just exactly in accordance with our contentions. And the first one is another California case, *Bowles v. Chew*, 53 Fed. Supp. 787. This was a case where the sale was made to retailers and the action was brought, as the title gives, by the Administrator of the Office of Price Administration, and the Court refused to follow the reasoning in the *Glick Brothers* case.

The Court: What Judge?

Mr. Jaureguy: This is 53 Fed. Supp. 787.

The Court: What Judge?

Mr. Jaureguy: Oh, what Judge? This was Judge Goodman. But here again, while the Court held that the Office of Price Administration was the proper one to sue, the line of reasoning is exactly similar, as I am giving now, and that is that

the OPA had the right to sue in this case because the purchaser was a retailer and the Court first points out what was held in the Glick Brothers case and then says:

“In my opinion, Section 205(e),” which is the section that is involved that I read a few moments ago, “of the Act does not reasonably admit of any such construction. What Congress said, what it meant, and the rationale thereof, are the pertinent considerations in constructing the Act. [98]

“Congress said: ‘the person who buys such commodity for use or consumption, other than in the course of trade or business may bring an action * * *’. Thus is described the person who may sue. If the buyer of merchandise is not in the above described category, then ‘the Administrator may bring such an action on behalf of the United States.’ Thus is described the circumstance whereby the Administrator is empowered to sue. The Senate Report on the Act,” giving a citation to it, “indicates the foregoing to be the precise meaning intended by Congress.”

I may say that I finally found the Senate Reports in this city and they copied the parts that are applicable here and I won’t read it, except to tell your Honor I don’t think it has much to do with this particular question, and I have it here if anyone wants to see it.

“It is not subject to dispute that a ‘person who buys for use or consumption,’ means, in the ordinary sense, the consumer, i.e. the general public buying over the counter, for its own use. In

order that there might be no doubt that Congress intended this description to be in the ordinary sense, it added the excluding clause: 'other than in the course of trade or business.' Thus," and here is the conclusion the Court draws from that, "the tradesmen, i.e., merchants engaged in business, buying and selling between themselves, were not given the right to sue." [99]

Then the Court goes on to say: "It is clear to me that what Congress said and meant is that members of the general public who buy commodities, to use or consume themselves, may sue for treble damages, but that tradesmen, who deal and buy and sell between themselves in the course of business, may not sue one another."

Then they give—I will read it: "The rationale backgrounding this enforcement program is quite obvious. The consumer (member of the general using and consuming public) cannot in his daily life keep abreast of the ceiling prices of the countless articles on the market which he needs."

A good illustration, Mr. Gilmore told us he didn't keep track of this.

"He can easily be advantaged, since a small overcharge cannot readily be detected.

"To implement the battle against inflation, the right to sue for damages was considered by Congress as an effective deterrent to price ceiling violations. The buying public is enlisted in the anti-inflation fight. It is made worth its while to act as an active agent to enforce the law." Then they refer to that same Senate Report. "On the other

hand, Congress clearly indicated that merchants and dealers, trading with one another, presumably for profit, should not engage in inter-commercial litigation to enforce the Act or prevent violations. Hence the right to sue for such viola- [100] tions was reserved to the Administrator, inasmuch as he has licensing authority under the Act, and may, by virtue of the record-keeping requirement readily assemble the data for enforcement."

And then they go on further and criticize the Glick Brothers case.

So in that case, while holding is not either for or against either side to this case, because the sale was a retailer's, the entire reasoning of the Court is that the expression, "for use or consumption in the course of trade or business" means for persons buying for the purpose of putting it back on the market and selling it, and anybody else is not for use or consumption in the course of trade or business.

Then we have one or two other cases here. Here is another case, which is in a sense very similar to the one I just read, from the Federal District Court for the Western District of Kentucky, and this likewise was a case of an action brought where the sale had been made to a retailer, *Bowles v. the Joseph Denunzio Fruit Company*, 55 Fed. Supp. 9; and they have other questions of searches and seizures here, and finally get down to this particular question, and here the case began, the sale being made to a retailer. They held that the Ad-

ministrator had the right to sue, but it was for the same line: [101]

“Defendant’s motion to dismiss the complaint is based upon the contention that any cause of action under the Emergency Price Control Act of 1942 runs in favor of the purchaser rather than in favor of the Price Administrator. Here reliance is again placed upon the decision in *Brown v. Glick Bros. Lumber Co.*, *supra*, in which case the District Court sustained a motion to dismiss based upon similar grounds. The right of action being enforced herein is conferred by Section 205(e) of the Emergency Price Control Act of 1942, Section 925(e), Title 50, Appendix, U.S.C.A. It places the right of action in the person who buys the commodity ‘for use or consumption other than in the course of trade or business,’ and then provides that if the buyer is not entitled to bring the action ‘the Administrator may bring such action under this subsection on behalf of the United States.’ The provision is in no way ambiguous and needs no judicial construction to ascertain its meaning. Where a retailer sells to a purchaser for use or consumption the purchaser can sue for the damages authorized by the Act; but where a wholesaler sells to a retailer who buys for resale in the course of trade or business and not for use or consumption, such retailer has no authority to institute the suit, but the right of action in such cases is vested in the Administrator.” And then they go on again to criticize Mr. Glick, of Glick Bros.,

but their line of reason is again the same line of reasoning I am urging upon [102] your Honor.

Then I have two or three cases on which I don't have the reports here, but one of them is the New York Supplement. I can get this over in the Library and bring them here. It is *Lightbody v. Russell*, first in the Supreme Court of New York, 45 N. Y. Supp. (2d) 515, and then it went to the Appellate Division of the Supreme Court in 47 N.Y. Supp. (2d) 711, and in that case as you can see from the title it wasn't the Administrator that was suing but the parties were suing, to begin with, in a partnership, and it so happened the article they bought was a tractor and they brought the action and merely alleged in that action that they were the ultimate consumers. No; they alleged they bought it for their own use; and the question is whether or not that was sufficient—whether they didn't have to further say that they bought it for use, not in the course of trade or business; and the Court held that they had stated a proper cause of action because when they said they bought it for their own use that negated the idea that they bought it for resale, and since, as the Court held the expression for use or consumption other than in the course of trade or business, means for use or consumption other than for purposes of resale, the Court held with the purchasers then who had bought the tractor, and the Court had to construe the complaint most strongly against them. [103]

I don't mean to say everything I am saying is in the opinion. I am just telling you how it had to be rationalized. The Court had to hold then a person who buys a tractor for his own use, where it is in connection with some occupation of some kind, has the right to sue as long as he negatives the thought he didn't buy it for resale. Then that case was appealed to the Appellate Division of the Supreme Court and the Appellate Division affirmed the lower court. There was a dissenting opinion in that case of *Lightbody v. Russell*. On appeal it is in 47 N. Y. Supp. (2d) 711. In the lower court, 45 N.Y. Supp. (2d) on page 15.

I have tried to make as exhaustive a study of this as possible. I may say that my friends here I think have two cases in their favor. One is a Federal Supplement case, *Bowles v. Rock*, and another one is—I think there might be a New York Supplement case in their favor, and I think there is an unreported decision in their favor, but I have two unreported cases I have run down through C.C.H. cases, and I want to call those to your Honor's attention. I think sometimes unreported cases are better than those reported, because when they are unreported the Judge sometimes elaborates a little more. At least that is what I have found in these cases.

Brown v. Malloy, the District Court of the Eastern District of Pennsylvania, Federal Court, and the only way I [104] can tell anybody who is interested how to find that case, it is in C.C.H., paragraph 51331. This was a case involving tractors.

A farmer had an auction sale and the purchasers were also farmer, and they bought two tractors and a hay baler, and the question was whether or not the Administrator had the cause of action. Concededly the farmers bought this for use on their farm, and if using for logging is for use in the course of trade or business, then using on a farm is, too. In fact, one of their cases is for use on a farm. And the Court, in referring to this portion in the course of trade or business, said: "We take these phrases to mean that a private buyer who purchases for his own use or consumption is given the right to recover compensation for the unlawful advantage taken of him by the seller in exceeding the ceiling price. But a dealer or other persons in the trade or business who purchases needs no such protection.

"There would seem to be no logical reasons for restricting the privilege to only those persons who buy articles for uses not in any way connected with their trade or business. Such interpretation would mean that a purchaser of a tractor for use on his farm would not be entitled to the redress provided, but a purchaser who buys the same kind of appliance for use in cultivation of his private estate, not maintained as a business, would have the right to recover treble the overcharge. This interpretation is strained and [105] illogical and we would not be disposed to adopt it"; and so they dismiss the action that was brought by the Office of Price Administration.

Then there is another unreported decision, too,

which I think is a very good decision, and that is *Bowles v. Googins*. This is in the District of Utah; it looks here like the Third District to me; C.C.H., Paragraph 51176. There were two purchases here, both of pipe. A farmer bought some pipe to use for irrigating purposes on his farm and the livestock company likewise bought some pipe for water in order to feed their stock with, and the Court held in both cases—of course, this was just one action for two sales by Googins. The Court held the Administration didn't have the cause of action; the form of action was in the farmer and the livestock company; and the Court makes one observation which I haven't seen in any other case, and I think it is very pertinent; and that is, the Act does not say he buys for use in trade or business, which seems to me would have been the logical thing to say. I would have said, if Congress was intending to provide that nobody who uses it for profit in industry or occupation, or farming, or anything, would have said, as I said before, in the course of business, trade, occupation or profession. But this Court points out here it does not say for use in trade or business, but it says who buys for use or consumption other than in the course of trade or [106] business, and the Court here points out that that distinction there—that there should be a distinction, and then gives this illustration: A farmer who buys himself a pair of overshoes and he wears them to irrigate his crops—gives that illustration. Is there any conceivable reason why the OPA should have the

cause of action for the overcharge, which goes on to point out if he buys a pair of overshoes and uses them for any other purpose, walking back and forth to church or going out hunting, he has a cause of action, but if he uses the same overshoes for the purpose of going out when he irrigates his crops then he doesn't have a cause of action, according to the Administrator's contentions, but the Administrator has it.

I may say in this case, *Bowles v. Googins*, the Court didn't follow the line of reason that I am urging, and didn't follow the *Glick* case, didn't follow the *Chew* case, but had a new independent one, and that is it said that a person who is in some occupation or trade where he makes money, industry, and he buys something that is just bought occasionally, your Honor, he has the cause of action and not the Administrator; but if he is in some industry that day after day buys something, even though it is not for resale, the Administrator has it. Personally I don't get that distinction, but he says in the course of trade or business means something about repeatedly, time and [107] time again; and of course a tractor, whether bought by a farmer or logger, is something just bought occasionally. He goes on to give an allustration—a purchaser of large quantities of goods for use in industry, then the Administrator would have the cause of action.

Then there is a third unreported case I would like to call your Honor's attention to, and that is *Bowles v. Seminole Rock & Sand Company*, and that was by the District Court for the Southern

District of Florida, and you get that in C.C.H., Paragraph 51122, and I am sorry that this opinion here does not tell what it was used for but it is very clear from the opinion what it is. This is an action by the Office of Price Administration and they dismissed on the ground that the Office of Price Administration didn't have the right.

“We will first take up the second count, considering the two counts in inverse order. The Court is of the opinion that no cause of action has accrued to the Administrator for this excessive charge, assuming that it was excessive. As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages. It make no difference whether that ultimate consumer is a housewife purchasing a can of soup or the railroad purchasing a \$100,000 Diesel engine. The object was two-fold. First, if the merchant or middleman in purchasing from a [108] jobber or manufacturer was *particeps criminis* to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore it would have been iniquitous to give him the right to recover three-fold damages when he was as deep in the mud as the manufacturer in the mire; but the ultimate consumer had no place to pass it on and no temptation to pass it on, and therefore the ultimate consumer is who they mean ‘in the course of trade’ ” —the language is a little bit mixed here to me, of course, the way it is in my copy, I am not sure. “They could have used more understandable

language but I construe it to mean 'ultimate consumer.' In addition to that," then they go on to talk about the other.

So we have three Federal unreported cases and one Federal reported case, and one New York case of the Appellate Division of the Supreme Court of New York, expressly holding that in a case of this kind the Administrator does not have a cause of action, either in four of these cases, dismissing it when it is brought by the Administrator, and in the fifth holding that when the individual does bring it he is entitled to pursue it in the face of the objection that it belongs only to the Administrator, in addition to which we have at least two cases—and then of course we have the Glick Bros. case, holding that the Administrator cannot bring the action—in addition to which we have other cases, two or three other [109] cases, where retailers were involved, and each holding that the Administrator has the right of action but using exactly the line of reasoning that excludes the Administrator in this case, and I don't think they will have an array of authorities that anywhere near touches that. So we say that the Administrator does not have the cause of action.

Now we come back to where I said I was; that is, if he does have a cause of action, is this document here in some way violated? And I take it that there is not any contention here. I haven't gone over the other documents. I understand the rule to be that where they file a complaint and a pre-trial order saying that this is the particular

regulation we violated, that I don't need to look at all other regulations. This covers machines and parts, and machinery services, and it says that only the machines, that is the term of machines. Parts means and is limited to products falling within the groups listed within Section 1390.32, Appendix A, and 1390.33, Appendix B; so we go back and search through Appendix A and Appendix B and see if we can find this machine there. I will have to admit that I had a very hard time until I was enlightened by my friends. This is under several headings, and the first is prime movers, under head "(a) Prime Movers." I said to myself, "Well, a tractor must be a prime mover," and so I look in there and I find Diesel engines and gasoline engines for [110] tractors, and Diesel engines for aircraft, but I didn't find tractors.

Then I look in industrial and marine power apparatus, and I said, "Well, a tractor might be an industrial power apparatus," and I could not find it there.

"Processing machinery and equipment," but I could not find it there.

Then the next heading was "Construction and Mining Machinery," and I said, "Well, certainly it is not there."

So I omitted that and went on, and one day tractors were not mentioned, and then it was called to my attention that it is under the one they are claiming. They haven't made this in their argument but I understand *they* will be their argu-

ments—that it is listed under “Construction and Mining Machinery.”

Well, tractors can be used, I suppose, and are used, as part of construction machinery, but when most of us think of tractors we think of machines that are used for other things, but under “Construction and Mining Machinery” is listed crawler and nonagricultural tractors. Well, there is no testimony in this case that this is an agricultural tractor or is not an agricultural tractor, except testimony that it was bought from a farmer, that the farmer had had it on his farm and it was adaptable to being used on a farm. Of course I will admit that the expression crawler and non- [111] agricultural tractors is subject to two constructions. It might be subject to the construction crawler tractors or nonagricultural tractors, or it might be subject to the construction crawler or nonagricultural tractors. You have to judge it both times in order to find out what it means, but it seems to me that where they have put this type of a machine under the heading of construction and mining machinery, and have said simply crawler and nonagricultural tractors, we won't have a tractor to be within this type of construction of mining machinery. It must be both a crawler tractor and a nonagricultural tractor, and in this particular case I think it can well be said to be a crawler agricultural tractor because it was a tractor that was used on a farm and was adaptable to being used on a farm and was purchased, and there is no evidence in the case, generally speaking, as distinguishing between

what was an agricultural tractor and a nonagricultural tractor. If I may say so, the general thought on the subject is this: That almost any kind of a tractor can be, and almost any kind of a tractor is used for agricultural purposes today from the very smallest to the very biggest.

Then there is another point here in which I think their language is very ambiguous, and I have my doubts if it applies to this case, and that is they have a group of sections, 1390.2, subdivision (f) is one of the sections. [112]

“Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof.” Of course, so far I don’t think there will be any contentions that we fall within that definition, because we are not a manufacturer.

“For the purpose of this exclusion, a sale or delivery is deemed to be ‘at retail’ when made to an ultimate consumer, other than an industrial, commercial, or Governmental user.”

Well, we are not a Governmental user. I don’t think it can be said we are a commercial user, and the question is whether we are an industrial user, and I will have to admit that in some senses logging use is an industrial use. In fact, I think that we can say that the word “industry” and also the word “commerce,” either of them used alone, embraces a lot of territory, and when you say “industry” and you don’t in any way modify it, you expect it to cover just about everything that people work at other than the provision for a livelihood. But while it has that broad

meaning it also has the more narrow meaning, and when you use the word "industry" along with the word "commercial," it is clear that the word "industry" does not include "commercial" and the word "commercial" does not include "industry," and it has rather a narrow meaning then and it must be given its narrow meaning, just generally understood, to be the processing of food in factories where a large amount of capital and labor is used. [113]

I have one case here, for instance—it is not an OPA or anything of that kind, but it illustrates this point, and it is *State Ex Rel v. Smith*, 111 S.W. (2d) 513. This was an action to determine whether or not a certain tax was applicable to a street railway company. It was an electricity tax, and the statute provided that the tax should be upon the use of the electricity for commercial or industrial purposes. Now I would say that running a streetcar system is just as much an industry as running a logging establishment, and yet the Court held that it didn't apply there; if the word "industry" alone had been used, they said it had a broad connotation, but when they put the two in there it showed it was intended to be used in its narrow meaning.

The Court said: "Industrial establishment connotes a place of business which employs much labor and capital and is a distinct branch of trade," citing Webster's Dictionary; and, therefore, that if they had wanted to use it in this particular sense they would have used a broader term, and they gave

examples of broader terms, which I can't recall, but industrial, commercial or occupational, or things of that kind.

And in another case, which has nothing to do with this subject, but, nevertheless, they refer to it, *North Whittier Citrus Association v. National Labor Relations Board*, 109 Fed (2d) 76. They define "Industrial activity commonly [114] means the treatment or processing of raw products in factories." So it would seem here, if they intended to cover this type of a case, they would have defined retail a little different than they did here, industrial, commercial or Governmental. If a man uses it, buys it, I mean, an industrial or commercial user, but if a farmer buys it, even though a small farmer, he is an industrial or commercial user.

Well, for those reasons, first, I don't say this language covers it. Second, because if there is a cause of action it is not in the Administrator; and, third, because when we consider the price of the most nearly comparable item and add to it the spares—there is no evidence as to the lowest price of these spares that were therein and not except certain new ones that were on there—when we add these things that this man didn't violate the ceiling.

I am not going to discuss at length the question that your Honor will not reach, unless you find there was a violation and the Administrator has the right to. I think your Honor is satisfied if there was one it was in good faith and without any

consciousness on his part that he was violating a ceiling. It so happens that while he and the man from Allis-Chalmers reached the same point they did it by different methods. That is, he didn't take this new machine; he took the old machine; but he thought that the 55 per cent was applicable, not to the price in the East but [115] to the price at which it was sold in Eastern Oregon, and he roughly computed 55 per cent of that but at the appropriate price for the new things put in, and his labor. So if he did that it was well within bounds, and if your Honor should come to that point I am sure your Honor will agree with me it can't be anything except a good faith violation.

Mr. Wagner: In connection with the question he has a cause of action, your Honor, I really didn't feel as though there was any question about that in this case at all. The result is I haven't done any exhaustive search on it, such as counsel here has. Some of those cases I am familiar with. Some of the decisions that he has quoted I am not. However, I will say that there was for some period of time during the early stages of price control some question as to the language that has been used in this section of the Act, but I think that now concurrently there is practically no question about it in the minds of any of the Courts.

The Glick case is the only case of its kind. There the Court held that the Administrator was confined in his cause of action only to the operations or sales of the black market type, and that I know of

no decision that has ever followed it. A number of the decisions have but I don't believe that any of the decisions have followed the Glick case, and it of course is on appeal.

The Seminole Rock Company case, which counsel cited, [116] I am familiar with, where the question concerned gravel, the purchase of gravel, I believe, by a railroad company, which actually used and consumed the gravel in its operations of maintaining its roadbed, and the Court there held that the use was one of ultimate use and consumption. I believe that that case is on appeal, too, your Honor.

My feeling about the thing is that we are entirely governed by the language of the statute, that the words "for use or consumption other than in the course of trade or business," means personal use or consumption; that is, any use or consumption that is for anything other than personal use, would give the cause of action to the Administrator. The uses in the course of trade or business are the Administrator's causes and they are for the ultimate use or consumption as the personal use or consumption gives the person a right of action, and I think that is the rule which many of the cases have followed which counsel has cited. The Chew case is an example of that. There the use was for a personal use or consumption.

Now there are cases where there is a question about that. For example, a filling station operator has purchased a pair of overalls to use where he is working at the filling station and employed

by the operator. Is that purchase of the overalls one for personal use or consumption, or is it in the course of his trade or business? I feel that in this [117] kind of situations, where there is a question, or there is a possible question, as to whether it is in one or the other, that the use or consumption, the immediate use or consumption is that which should govern, and that where he urges they are to run for the protection of the body, that the cause of action should lie in the purchaser there.

That is true also for example, with people who travel in connection with their business and they rent a hotel room. It is in the course of their business, and maybe they have an expense account which they charge their employers with. Is the privilege of sleeping in that room one for personal use or consumption, or is it in the course of trade or business?

Well, I think there that the immediate use is one for personal comfort; that the hotel room is used by the person himself; that he, therefore, should have the cause of action.

That can be applied to food, too. Where a person is eating and traveling for some concern, is the food to keep him alive and to keep him going? Is that used in the course of trade and business of that concern, or is it for personal use or consumption? And I don't think that there should be any question about those situations. They are matters of impersonal use or consumption and the pur-

chaser should have the cause of action in those cases, without question. [118]

Now there are a number of cases here that have considered that language of the Act. One is *Tropp v. Great Atlantic & Pacific Tea Company*, where the purchases were at retail—or where the purchases were at wholesale, and the Court holding, reading from the headnote, “The purchaser may not recover treble damages for payments made in excess of ceiling prices where the commodity is not purchased for use or consumption,” following the wording of the statute.

Another case is *Bowles v. Empire Packing Company*, concerning the ceiling above. Reading from the headnote here:

“The action for treble damages under the Act may be brought by a purchaser only where he buys the commodity for use or consumption other than in the course of trade or business. Where these conditions are not met only the Administrator may bring such an action.”

Another case is *Bowles v. Curtis Candy Company*, where the purchase was the sugar for use in making the candy, and the Court holding that under the Act the Administrator is entitled to sue for the penalties prescribed therein where sales are made in violation of the Act were made in the course of trade or business, the purchaser being denied the right to sue under such circumstances.

And in *Bowles v. Occident*, Northern District of California, decision by Judge Goodman, holding that where [119] the defendant had sold meat

at prices of meat regulations the Administration was entitled to recover treble damages where the purchase was not for personal use or consumption.

More particularly, *Bowles v. Silverman*, involving a sale of equipment to a farmer, in the U. S. District Court for the District of South Dakota, decided March 9th, 1944, the Court holding, reading a little bit from the opinion. The Court quotes this section of the statute and says this:

"The wording of the statute, it seems to me, leaves no room for doubt that if the purchases involved here were made for use or consumption in the course of trade or business of the respective purchasers, the Administrator is exclusively authorized to bring this suit"; holding that a purchase by a farmer of equipment for use on his farm activities was in the course of trade or business.

Bowles v. Sieff is another case, U. S. District Court for the District of Minnesota.

Mr. Jaureguy: What is the name?

Mr. Wagner: *Bowles v. Sieff*, May 4th, 1944.

Mr. Jaureguy: You don't have the citation?

Mr. Wagner: No. It is Civil No. 7050. If you ever want to use this book it is in 1 Opinions and Decisions, Office of Price Administration, at page 1320, involving the sale of new rubber tires and tubes to dealers, holding that the use or consumption must be other than the course [120] of trade or business if the purchaser would have the cause of action.

And likewise, in *Bowles v. Denunzio*; that is the Western District of Kentucky, May 13, 1944, in-

volving sales of citrus fruits and certain vegetables, holding that the sales, being for other than personal use or consumption, the Administrator had the right of action.

Now all of those cases are on the well settled principles that the use or consumption must be for personal use or consumption in order for the purchaser of the commodity to have a cause of action, and if the Court is interested in that question any further I will be very, very happy to exhaust the authorities on it. Those are all that I have here with me.

Now in connection with the question as to whether or not the regulation applies, I don't think there is any question about it. Counsel, in referring to the definition of a retail sale, or a sale at retail, is not taking into account the fact that that provision is put in the regulation for the specific purpose of classifications of sales of other commodities. The regulation is either an inclusive one and covers such things as nuts, and bolts, and some items that approach the hardware stage, and those sales at retail are governed by various provisions of the regulation and the definition is in there for that purpose, not for the [121] purpose of confusing this particular sale as to whether or not it is in the course of trade or business, or as to whether or not this sale is within the regulation.

I think counsel very definitely stated that crawler type tractors are within the regulation. I think he virtually concedes it. And then the evidence certainly discloses that this is a crawler type tractor.

Ordinarily a farm tractor is a wheel tractor. I think it is a matter of common knowledge, and the tractors are so classified by the Office of Price Administration, and farm tractors ordinarily have wheels on them and it is the industrials that ordinarily do have the crawlers on. However, there are a lot of crawler tractors being used by farmers; we all know that; and just because of the fact that the trade has classified them one way and that classification has been followed by the office in fixing the prices, I would say had no bearing whatsoever on whether or not a particular tractor is within or without the regulation. As to the sale itself, if the Court feels that the gasoline, or the ignition type of oil burner of October, as the evidence disclosed as the comparable type of equipment, the most nearly comparable type of equipment by which the price of this particular machine should be gaged, it certainly can use that price, and if it decides that the new price of a full Diesel is the more comparable it certainly can use that price in arriving at the price. [122]

We have brought forth the evidence. We feel that the most nearly comparable is the one. If the Court feels it is the other way, of course the Court can make its decision accordingly. We are giving, of course, full credit for the two pieces of equipment that the evidence discloses were attached to the machine.

In connection with the other matters that the defendant has sought to introduce here, I don't believe that the Court should in any way consider

that in arriving at the price. In the matter this guarantee here is a very logical thing. If there is an express guarantee, and if all of the worn or missing component parts of this machine have been replaced, I see no reason why a guarantee should not be forthcoming. The fact of the matter is, and the evidence discloses, that the machine wasn't in a workable condition. It would not perform and it didn't perform, and it had to be repaired, and the man was left without any recourse against the seller on the basis of a guarantee. He had nothing there to look back to the seller for in exacting or extracting the particular price that he did. The evidence of repairs date back to a year previous to the time of sale. They were intermittent repairs, and naturally a heavy piece of equipment, in doing the load, in doing the work that it was made to do, would necessitate a whole lot of repairs and I believe just not because of the fact that the regulation [123] excludes the consideration of that evidence alone but because looking at the thing from the purely logical standpoint I don't think that evidence should be considered at all.

Going to the regulation, however, the price that is accorded the machine is dependent upon there being an express and a binding guaranty, and in this case it is conceded, admittedly so, that there was none.

We feel, in conclusion, that regardless of which machine is found by the Court to be the most comparable with the fact that there was no guarantee, and that the buyer had no recourse whatsoever,

should relegate the price to the 55 per cent price of whichever machine the Court finds is the most comparable.

The Court: What did you say back there about ten minutes ago, about the two pieces of equipment that were attached to it?

Mr. Wagner: What are they?

(Mr. Joy and Mr. Wagner here conversed in undertone.)

Mr. Wagner: There was an armor guard bumper, and a bull or pull guard. The armor guard is recorded at the price of \$85.00, and I believe there was testimony to that effect. The testimony on the hook was—was it \$17.50?

(Mr. Joy here conversed with Mr. Wagner in an undertone.) [124]

Mr. Wagner: Well, we originally conceded that it had a value of \$25.00, and we will certainly be willing to go that far with the thing. That was an original concession. That was made at the time I believe that this matter was first called to Mr. Joy's attention, and we are willing that that be the price to apply to that.

The Court: How does that enter into the calculation?

Mr. Wagner: Well, it is in addition to the comparable new price, so that it would be an addition to the \$4240, of which total 55 per cent should be ceiling price. Is it forty-two fifty or forty-two forty?

Mr. Joy: Forty-two forty.

Mr. Wagner: Of the full Diesel?

Mr. Jaureguy: Forty-two fifty. What about these 18-inch shoes that you had testimony on, \$295.00?

Mr. Wagner: These are merely replacement parts, as far as I am concerned.

Mr. Jaureguy: The original was—don't take this.

Mr. Wagner: I don't know. Was there some testimony on it?

Mr. Jaureguy: \$295.

Mr. Wagner: Over and above the cost of the 15-inch standard shoes?

Mr. Jaureguy: That is all he said. You asked him what it would cost, and he said \$295. [125]

Mr. Wagner: Well, I think that the burden would be upon you, if there was any. We are not conceding—we are taking the position that replacement parts that were purchased for this machine are not to be allowed as extras. Now if there are any parts that should be regarded as extras, why, I certainly think the defendant has the burden of showing that. We have shown everything that—we are willing to concede the \$25.00, because of an original admission, although the testimony was \$17.50, I think.

The Court: I have to reserve decision because it is new to me, and if you want to add anything to what you have said, Mr. Wagner, you may send it to me by mail right away. You didn't say whether—you said you had always taken it for

granted that there was no question, but under facts like this that the Administrator was a proper party plaintiff. Did you mean by that that you are not familiar, for instance, with these two cases that Mr. Jaureguy cited? He cited one tractor case and cited one farmer case, which seemed to be pat cases.

Mr. Wagner: No. I am not familiar with the farmer case that he cited. I would like to have opportunity to look at it.

The Court: All right.

Mr. Jaureguy: I don't like to say this but of course it was in the pre-trial order. This question was involved, and [126] Mr. Joy and I discussed it twice, and we explained each other's theories, and I gave him the cases I had at that time. I think it is just a case where my friend, Mr. Wagner, just came into this case, when he was, however, there, and he wasn't prepared for that, which is all right, but I don't want the impression to be gotten—I don't think it is deliberate; I know it is not deliberate—the impression to be gotten that I haven't given full disclosure at the pre-trial of what I was going to contend. I gave quite a talk here. It may not have been intelligible, but it was explained to Mr. Joy afterwards.

The Court: I know that.

Mr. Jaureguy: I wonder if I may say one more word? That is, he cited a lot of cases. I tried to follow them. If I followed them correctly, there was only one case that was like this case. All the rest of the cases, of course, stated good law under my

theory, and there was only one case where somebody used it all which they used in connection with some occupation where they thought there could be a cause of action by the Administrator.

The Court: Now, you see, nearly always it seems there is one Government Agency which is the major litigant in this court. A few years ago there were four or five hundred war risk cases pending here, and right now the OPA is the major litigant, numerically I think with thirty or forty pending [127] OPA cases, where they appear as plaintiff in nearly all, and with which I am charged in the division of the calendar with responsibility. That means the Government is nearly always in those fields that are being extensively litigated. It has one or more people specializing in that field. So Mr. Wagner said that he had never understood there was any authority, such as you have cited and argued. Working all the time in that field, that caught my attention. He didn't mean—I don't mean to say he didn't mean you had taken anybody by surprise. He meant that he as head Enforcement Attorney here—I really forced him into this case—had never heard of these cases. If he hadn't I want him to get familiar with them, because I want his views on them, because the point you raise—

Mr. Jaureguy: You might dismiss a lot of these.

The Court: I don't know how serious it is, now that the statute has been amended, but the point of course is a serious point. Who has the first right

to sue now under the amendment for the first thirty days?

Mr. Wagner: In situations where the use or consumption is other than in the course of trade or business the purchaser there has the right to sue for the first thirty days.

The Court: He has the thirty-day right?

Mr. Wagner: Yes. Then of course the cause is, your Honor, one having a dual right either in the purchaser or [128] the Administrator.

Mr. Jaureguy: An action by the Administrator would bar the purchaser. A judgment in favor of either, again I would say, would also bar the Administrator. I think it would work both ways.

The Court: Alva, will you gather everything up and keep it overnight? All right, Gentlemen. Thank you.

(Thereupon the foregoing hearing was concluded at 5:20 o'clock P.M.) [129]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the proceedings had upon the trial of the case of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, v. L. G. Trullinger, Defendant, Civil No. 2403, on Monday, November 13, 1944, before the Honorable Claude

McColloch, Judge; that I thereafter prepared a transcript from my shorthand notes so taken, and the foregoing and hereto attached 123 pages, numbered 7 to 12,, both inclusive, contains a full, true and correct record of all of the evidence given and proceedings had upon said hearing.

Dated at Portland, Oregon, this 3rd day of March, A. D. 1945.

ALVA W. PERSON

Court Reporter [130]

[Endorsed]: No. 11013. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. L. G. Trullinger, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 21, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States in and for the Ninth Circuit

No. 11013

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

L. G. TRULLINGER,

Appellee.

STATEMENT OF POINTS

On the appeal taken in the above entitled action the appellant, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points:

1. That the District Court erred in failing to find as a fact that the defendant sold to Earl Gilmore and the said Earl Gilmore purchased from the defendant for use or consumption in the course of trade or business a tractor and other personal property subject to Maximum Price Regulation No. 136 at a price in excess of the maximum permitted by said regulation for said tractor and other personal property.

2. That the District Court erred in finding as a fact that the said Earl Gilmore purchased said tractor and other personal property from defendant otherwise than for use and consumption in the course of trade or business.

3. That the District Court erred in concluding

as a matter of law that the right of action arising as the result of the sale of said tractor and other personal property to the said Earl Gilmore at a price in excess of that permitted by said Maximum Price Regulation No. 136 was not vested in the appellant.

4. That the District Court erred in holding that the sale of said tractor and other personal property was not covered or governed by said Maximum Price Regulation No. 136.

5. That the District Court erred in failing to hold that the sale of tractor and other personal property was covered and governed by said Maximum Price Regulation No. 136.

6. That the District Court erred in finding that the price at which said tractor and other personal property was sold by the defendant to said Earl Gilmore, to wit, \$2800.00, was not in excess of the maximum price permitted by said Maximum Price Regulation 136.

7. That the District Court erred in concluding as a matter of law that the said defendant had not violated said regulation by making said sale.

8. That the District Court erred in concluding as a matter of law that the defendant was entitled to judgment and that appellant was not entitled to recover.

9. That the District Court erred in dismissing the action.

10. That the District Court erred in failing to

grant judgment in favor of appellant in accordance with the prayer of complaint on file herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

F. E. WAGNER

District Enforcement
Attorney

Attorneys for the Appellant

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herein designates the entire certified transcript, including all exhibits, to be contained in the printed record on appeal herein.

HERBERT H. BENT

Acting Regional Litigation
Attorney

F. E. WAGNER

District Enforcement
Attorney

Attorneys for the Appellant.

[Endorsed]: Filed May 29, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

The parties hereto having by stipulation so agreed it is now by the Court

Ordered: That in printing the transcript herein the Court omit Exhibits No. 2 and No. 3 in the Court below, but that said exhibits may be considered by this Court on this appeal as fully as though printed.

Dated: June 12, 1945.

FRANCIS A. GARRECHT

Circuit Judge

[Endorsed]: Filed June 12, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the above entitled parties by and through their respective attorneys that defendant's exhibits numbered 2 and 3 may be omitted from the printed record or transcript on appeal herein but that said exhibits may still be considered by the Court as a part of the record on said appeal.

In accord with the Designation of Record herein on file, all exhibits will be contained in said printed record on appeal, save and except as hereinabove indicated they be omitted.

HERBERT H. BENT

F. E. WAGNER

Of Attorneys for Appellant

NICHOLAS JAUREGUY

Of Attorneys for Appellee

[Endorsed]: Filed June 12, 1945. Paul P.
O'Brien, Clerk.

No. 11013

In the United States Circuit Court of Appeals
for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

L. G. TRULLINGER, APPELLEE

APPELLANT'S BRIEF

GEORGE MONCHARSH,

Deputy Administrator for Enforcement.

DAVID LONDON,

Chief, Appellate Branch.

SAMUEL COHEN,

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HERBERT H. BENT,

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ADAMS F. JOY,

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Portland, Oregon.*

FILED

SEP 20 1945

PAUL P. O'BRIEN

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INDEX

Jurisdiction.....	Page 1
Statutes and Regulation Involved.....	2
Statement of Facts.....	4
Specifications of Error.....	6
Argument: I. The ruling below, that the statute as applied to the facts of the instant case, gives the right of action to the purchaser and not to the Administrator, is clearly erroneous.....	7
II. The Court erred in finding as a matter of law that defendant had not violated Maximum Price Regulation 136.....	16
Conclusion.....	18

CITATIONS

Cases:

<i>Augustine v. Bowles</i> , 149 F. 2d 93 (C. C. A. 9th, 1945).....	17
<i>Bowles v. Franceschini</i> , 145 F. 2d 510 (C. C. A. 1st, 1944).....	17
<i>Bowles v. Glick Brothers Lumber Co.</i> , 146 F. 2d 566 (C. C. A. 9th, 1945), cert. denied June 11, 1945.....	13
<i>Bowles v. Googins</i> (D. C. Utah, 1944) C. C. H. War Law Service Price Control, Par. 51, 176, 2 OPA Op. & Dec. p. 2049.....	14
<i>Bowles v. Rock</i> , 55 F. Supp. 865 (D. C. Neb., 1944).....	13
<i>Bowles v. Rogers</i> , 149 F. 2d 1010 (C. C. A. 7th, 1945).....	12
<i>Bowles v. Seminole Rock & Sand Co.</i> (S. D. Fla., 1944) 1 OPA Op. & Dec. 1271, affirmed 145 F. 2d 482 (C. C. A. 5th, 1944), rev'd 65 S. Ct. 1215.....	11
<i>Bowles v. Silverman</i> , 57 F. Supp. 990 (D. C. So. Dak., 1944).....	13
<i>Brown v. Glick</i> (S. D. Cal.), 1 OPA Op. & Dec. 1050, rev'd sub. nom. <i>Bowles v. Glick</i> , 146 F. 2d 566 (C. C. A. 9th, 1945) cert. denied June 11, 1945.....	14
<i>Brown v. Malloy</i> (E. D. Pa), 2 OPA Op. & Dec. 2112.....	14
<i>Colgate-Palmolive Peet Co. v. United States</i> , 320 U. S. 422, 426 (1943).....	13
<i>Lightbody v. Russell</i> , 45 N. Y. S. 2d 15; 47 N. Y. Supp. 2d 711; reversed 293 N. Y. 492, 58 N. E. 2d 508.....	12
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U. S. 294, 315 (1933).....	13
<i>Silas Mason Co. v. Tax Commission</i> , 302 U. S. 186, 208 (1937) ..	14
<i>Speten v. Bowles</i> , 146 F. 2d 602 (C. C. A. 8th, 1945), cert. denied, April 23, 1945.....	12, 17
<i>Swayne & Hoyt, Ltd. v. United States</i> , 300 U. S. 297, 300-303 (1937).....	14
<i>United States v. American Trucking Associations</i> , 310 U. S. 534, 549 (1940).....	13

Statutes:

Page

Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, Sec. 901 et seq., as amended by the Stabilization Extension Act of 1944, Pub. Law No. 383, 78th Cong., 2d Sess., June 30, 1944, 58 Stat. 640, 50 U. S. C. A. App. Sec. 925-----	4
Section 2 (a)-----	5
Section 4 (a)-----	9
Section 205 (e)-----	2, 7
Maximum Price Regulation No. 136 (7 F. R. 3198 issued April 28, 1942, effective June 1, 1942) as amended-----	5, 16

Miscellaneous:

Administrative Interpretation, issued July 3, 1942, OPA Service 11:804-----	13
Conference Report on the Price Control Bill, H. Rep. No. 1658, 77th Cong., 2d Sess. (1942), p. 26-----	11
Hearings before the Senate Banking Committee on the Price Control Bill, H. R. 5990, 77th Cong., 1st Sess. (1941):	
P. 141-----	10, 11
P. 216-----	10
Senate Report No. 931, 77th Cong., 2d Sess. (1942), p. 8-----	11

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11013

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

L. G. TRULLINGER, APPELLEE

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Oregon dismissing an action by the Price Administrator brought under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. A. App. Supp. II, Sec. 901 *et seq.*, as amended by the Stabilization Extension Act of 1944 (58 Stat. 636) seeking damages under Section 205 (e) as amended (50 U. S. C. A. Sec. 925 (e)). The judgment dismissing the action was entered December 6, 1944 (R. 12). Notice of appeal was filed December 28, 1944 (R. 11).

Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U. S. C. A. Sec. 925 (c)) as indicated in the complaint (R. 2) and

jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

STATUTES AND REGULATION INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and Maximum Price Regulation 136, as amended, issued pursuant to Section 2 (a) of the Act. The pertinent sections of the Act as amended are:

SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions*

*against the occurrence of the violation.*¹ For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.² If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was*

¹ As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

² Added by Sec. 108 (b) of Stabilization Extension Act of 1944.

rendered.³ The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.⁴

STATEMENT OF FACTS

This is an appeal from a final judgment (R. 13) dismissing an action brought by the Price Administrator against the defendant for statutory damages under Section 205 (e) of the Emergency Price Control Act of 1942,⁵ hereinafter referred to as the Act.

The complaint (R. 2-4) alleged that on or about April 7, 1943, the defendant sold and delivered to Earl

³ As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

⁴ Sec. 108 (c) of Stabilization Extension Act of 1944.

⁵ 56 Stat. 23, 50 U. S. C. App. Supp. II, Sec. 901 et seq. as amended by the Stabilization Extension Act of 1944, Pub. Law No. 383, 78th Cong., 2d sess., June 30, 1944.

Gilmore a used tractor at a price in excess of the maximum price established therefore by Maximum Price Regulation No. 136, as amended,⁶ (hereinafter referred to as MPR No. 136). The complaint further alleged that the machine was not purchased by Earl Gilmore for use and consumption other than in the course of trade or business. The Administrator demanded judgment for treble the amount by which the purchase price exceeded the maximum price (R. 3).

After interposing an amended and supplemental answer (R. 4-5) constituting in effect a general denial, together with the defense that the sale was made in good faith and that practicable precautions were taken to avert the violation, a pretrial order was entered on November 13, 1944 (R. 7-9).

Under this order, it was admitted that the court had jurisdiction; that Maximum Price Regulation No. 136, as amended, establishing maximum prices for certain types of tractors and other types of machinery was in effect; that defendant sold the tractor for \$2,800. It was agreed that the disputed issues were (a) whether the sale of the used tractor was covered by M. P. R. 136; (b) the maximum legal price of the tractor; (c) whether the sale was made for use or consumption in the course of trade or business; (d)

⁶ Issued originally by the Administrator pursuant to Section 2 (a) of the Act on April 28, 1942 (7 F. R. 3198) as amended June 30, 1942 (7 F. R. 5047) as amended April 5, 1943 (8 F. R. 4476), as amended May 3, 1944 (8 F. R. 16132).

the amount of the excess charges; and (e) defendant's good faith and lack of wilfulness (R. 7-8).

After a trial, at which the undisputed evidence showed that Gilmore was in the logging business and that he purchased the tractor from defendant for his logging operations (R. 28, 30), the court found as a fact that the sales price of \$2,800 for the tractor was in excess of the maximum price provided therefore by M. P. R. No. 136 in the approximate amount of \$462.50, but that the sale was made to Gilmore as an ultimate consumer and for use or consumption not in the course of trade or business within the meaning of the Act. (R. 11). The court concluded as a matter of law that by said sale defendant had not violated M. P. R. No. 136; that the right of action was in the purchaser and not in the Administrator, and that the complaint should therefore be dismissed (R. 12). Judgment to that effect was entered on December 6, 1944 (R. 13), and from it this appeal was taken by the Administrator on December 28, 1944 (R. 13-14).

SPECIFICATIONS OF ERROR

(1) The court erred in finding as a fact that the sale of the tractor to Earl Gilmore was a sale made to him for use or consumption not in the course of trade or business within the meaning of the Emergency Price Control Act (Fact Finding IV, R. 11).

(2) The court below erred in holding that where the purchaser is an ultimate consumer, then he and not the Price Administrator has the right of action. (See, Fact Finding IV, R. 11, Conclusion of Law II, R. 12.)

(3) The Court erred in concluding as a matter of law that in said sale by defendant, he had not violated Maximum Price Regulation No. 136 (Conclusion of Law I, R. 11).

(4) The Court erred in concluding as a matter of law that the right of action arising out of the sale was in the purchaser, Earl Gilmore, and not in the Price Administrator (Conclusion of Law II, R. 12).

(5) The Court erred in concluding as a matter of law that defendant is entitled to judgment and that plaintiff was not entitled to recover (Conclusion of Law III, R. 12).

(6) The Court erred in dismissing the complaint (Conclusion of Law III, R. 12).

(7) The Court erred in failing to grant judgment in favor of appellant.

ARGUMENT

The ruling below, that the statute as applied to the facts of the instant case, gives the right of action to the purchaser and not to the Administrator, is clearly erroneous

The solution of the question presented in this case turns on the construction of Section 205 (e) of the Act, which at the time of the violation involved herein read in pertinent part as follows:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action * * * for treble the amount by which the consideration

exceeded the applicable maximum price. If * * * the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States.⁷

The first part of the subsection provides that the *buyer* may bring the action only when the commodity is purchased "for use or consumption other than in the course of trade or business." The latter part of the subsection provides that "If * * * the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action * * * on behalf of the United States." Earl Gilmore admittedly purchased the used crawler-type Allis-Chalmers tractor from defendant for use in his business of logging (R. 28-30, 79, 80). The express terms of the statute, therefore, vested the right of action in the Administrator. This conclusion is fortified by the pattern of the statute and its history, and by *all* of the decisions of the appellate courts and by a great preponderance of those in the lower courts. Defendant's contention that the Administrator may sue only where the purchaser buys for the purposes of resale, is neither supported by the language of the Act nor its legislative history.

⁷ The Stabilization Extension Act of 1944 (58 Stat. 636) made certain changes in the amount of recovery and enlarged the Administrator's right of action by authorizing him to sue (if certain conditions were satisfied) in cases where the former Act gave the right of action exclusively to the buyer or tenant. The enlargement of the Administrator's right of action, however, in no way affects this case. The Amendment made no change in providing who may sue in the first instance. It made changes in the measure of damages which are discussed *infra* p. 17.

The distinction between buyers who purchase for use or consumption “in the course of trade or business” and buyers “for use or consumption other than in the course of trade or business” appears in two sections of the Act.

Section 4 (a) ⁸ makes it unlawful for the *seller* in *all* cases to charge more than the maximum price prescribed by the Regulation. This section, however, prohibits the *buyer* from paying more than the maximum legal price only when the purchase is made “for use or consumption in the course of trade or business.” No prohibition against paying more than the ceiling price is directed to one who buys for use or consumption other than in the course of trade or business.

This distinction in treatment between the two classes of buyers was undoubtedly responsive to considerations urged on Congress by the sponsors of the legislation. Congress was advised that:

* * * a lot of pressure on sellers comes from the buyers themselves. This does not apply to the ordinary purchaser of household goods for immediate consumption; it only applies to persons who buy in the course of trade

⁸ SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

or business, so that the price regulation is made applicable both to the seller and to the buyer and only to those buyers who buy for business purposes in business transactions. (Hearings before the Senate Banking Committee on the Price Control Bill, H. R. 5990, 77th Cong., 1st Sess. (1941), p. 141 (testimony of David Ginsburg, General Counsel of OPACS and OPA)).

Section 205 (e) carries forward the same distinction. It was thought inappropriate, no doubt, to allow a recovery for an overcharge to a buyer who had himself violated the law in paying the overcharge. In fact, if the purchaser acted wilfully, he would be subject to criminal prosecution under Section 205 (b) of the Act. It would indeed be a strange anomaly in the law to allow a lawbreaker to benefit by his own unlawful act. Another consideration was the fact that commercial purchasers might be able to add the amount of the overcharge when they in turn sold the product to the consumer. To permit them also to recover damages from the seller would encourage them to violate the Act. In order, however, that those who sell to such purchasers should not escape civil liability, the statute granted the Price Administrator a civil right of action against them. It was a right to institute suit for statutory damage in all cases of "industrial buyers" (Senate Hearings, *op. cit.*, at p. 216). The only purchasers who were empowered to sue for overcharges were "noncommercial consumers"⁹ (Conference Report on the Price Control Bill,

⁹ "The Senate amendment also contains a further provision, retained in the Conference Agreement, which permits a civil action by *noncommercial consumers* for treble the amount of any illegal

H. Rep. No. 1658, 77th Cong., 2d Sess. (1942) p. 26), "the housewife, in effect" (Senate Hearings, op. cit., at p. 141). As stated in the Senate Report on the Price Control Bill (S. Rep. No. 931, 77th Cong., 2d Sess. (1942) p. 8). Section 205 (e) "will permit *private* purchasers who buy for *personal* use or consumption *rather than in the course of trade or business*, to protect themselves against violations of the Act." [Italics ours.]

Defendants asserts (R. 99, 104), and the court held, that the proper test is whether the purchase was for the purpose of resale or for ultimate consumption (R. 11). But this is not the distinction made by the Act. The fact that a person may be an ultimate consumer, in and of itself is of no significance whatever in determining whether he is a purchaser for use and consumption *other* than in the course of trade or business. The purchaser is not given the right to sue whenever he buys for use or consumption, but only when he buys "for * * * use or *consumption other than in the course of trade or business.*" And was said by the Circuit Court of Appeals for the Fifth Circuit in *Bowles v. Seminole Rock*, 145 F. 2d 482 (C. C. A. 5th, 1944) rev'd on another ground 65 S. Ct. 1215, "the fact that the purchaser was the ultimate consumer of the material is of no significance, for the statute impliedly excludes not only purchasers for use in the course of trade, but also purchasers for consumption in the course of business. * * *"

overcharge (or a minimum of \$50) made by any seller of any commodity subject to a price ceiling." (H. Rep. 1658, 77th Cong., 2d Sess. (1942) at p. 26.)

And in *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. 2d 508, the New York Court of Appeals pointed out this distinction as follows:

It is correctly pointed out in the dissenting opinion in the court below that the statute quite naturally divides purchasers of commodities coming within its terms into two classes—those who purchase for use in the course of their trade or business, that is, for a commercial use and those who purchase for use or consumption other than in the course of their trade or business, namely, for a noncommercial use. Each is an ultimate consumer. But it will be noted that the statute confers a cause of action upon the purchaser from a violator of the price regulation only in the event that he is in the latter class.

Further, defendant's reading of the statute and the court's construction of it would violate the policy of the Act. Those who use or consume in the course of trade or business include some of the largest and most influential purchasers. Common examples are the steel mill buying coal for use or consumption in its blast furnaces, the department store buying delivery trucks, or the railroad buying ballast for its right of way (*Bowles v. Seminole Rock & Sand Co.*, *supra*). It has likewise been held, in the face of the contention that a farmer purchased his equipment for ultimate consumption and not for resale, that the Administrator has the cause of action, since the farmer buys a combine for use in harvesting his grain and for general farming use (*Speten v. Bowles*, 146 F. 2d 602 (C. C. A. 8th, 1945) cert. denied, April 23, 1945; *Bowles v. Rog-*

ers, 149 F. 2d 1010 (C. C. A. 7th, 1945); *Bowles v. Rock*, 55 F. Supp. 865 (D. C. Neb., 1944); *Bowles v. Silverman*, 57 F. Supp. 990 (D. C. So. Dak., 1944); *Lightbody v. Russell*, *supra*; cf. *Bowles v. Glick Brothers Lumber Co.*, 146 F. 2d 566 (C. C. A. 9th, 1944). Surely if such buyers fall within the prohibition of Section 4 (a) and are excluded from the benefits which Section 205 (e) was meant to confer on the non-commercial consumer, the purchaser in this case who bought the machine for use in his logging operations was likewise barred from suing under Section 205 (e), and therefore the Administrator has the right to sue.

This conclusion is also fortified by the official interpretation of the phrase "in the course of trade or business" as applied to buyers, issued by the Administrator as early as July 3, 1942 (OPA Service, p. 11: 804). In this interpretation, the Administrator declared:

The phrase "in the course of trade or business" applies to *purchases by industrial and commercial consumers* as well as to purchases for resale. In general, *it applies to buyers engaged in commercial activity for profit.*

[Italics ours.]

This contemporaneous interpretation of an administrative agency is entitled to great weight (*Lightbody v. Russell*, *supra*; *Bowles v. Glick Brothers Lumber Co.*, *supra*; *United States v. American Trucking Associations*, 310 U. S. 534, 549; *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 426; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315.

Moreover, Congress, by reenacting the Emergency Price Control Act in 1943 and in 1944 must be deemed to have ratified this interpretation of the Price Administrator and given it the force of law. (See *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, 208; *Swayne & Hoyt, Ltd., v. United States*, 300 U. S. 297, 300-303).

It remains only to consider the authorities cited by the defendant in the court below. There are: *Brown v. Glick*, (R. 109) (S. D. Cal.) 1 OPA OP. & Dec. 1050; *Lightbody v. Russell*, (R. 114, 115) 47 N. Y. Supp. (2d) 711 (App. Div. N. Y.); *Brown v. Malloy*, (R. 115) (E. D. Pa.) 2 OPA OP. & Dec. 2112; and *Bowles v. Googins*, (D. C. Utah, 1944), 2 OPA OP. & Dec. 2049.

Consideration of Defendant's Authorities

Of these cases, *Brown v. Glick*, and *Lightbody v. Russell* were reversed on appeal. (See *Bowles v. Glick Brothers Lumber Co.*, 146 F. 2d 566 (C. C. A. 9th, 1945) cert. denied June 11, 1945; *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. 2d 508). To the extent that *Brown v. Malloy, supra*, is to the contrary, it should not be followed by this Court since it is opposed to the conclusions reached by every Circuit Court of Appeals that has had occasion to consider the question.

Bowles v. Googins (D. C. Utah, 1944), C. C. H. War Law Service on Price Control, Par. 51,176, 2 OPA Op. & Dec. p. 2049, also can be of no comfort to defendant here. In that case there were four causes of action pleaded. The first two involved purchases by

farmers of pipe for irrigating crops and for piping water for livestock. The third cause of action involved a purchase of a used oil well casing by a company engaged in the development of oil production. The fourth cause of action involved the purchase of used water pipe in the installation of a municipal water system.

It will therefore be noted that in each cause of action the purchase was, as in the instant case, made not for resale but for ultimate consumption. The Court held that the first two causes of action based on the overcharges of pipe purchased by the farmers did not belong to the Administrator on the ground that buyers such as farmers *may not fairly be presumed to know of the overcharges*. We think to this extent the court's opinion was erroneous and is squarely opposed to *Speten v. Bowles, supra*, decided by the Eighth Circuit Court of Appeals, and *Bowles v. Rogers*, decided by the Seventh Circuit Court of Appeals. The court's ruling on the third and fourth causes of action, however, follow the established rulings on the subject. The court held that the Administrator was vested with the authority to sue on the third and fourth causes of action despite the claim that the casing and water pipe was to be used for "ultimate consumption." Indeed, the court expressly found the "ultimate consumption" theory to be unsound, saying:

An oil well company engaged in the development and production of oil is in the business of digging oil wells. The casing used in the drilling of oil wells is one of the essentials of the equipment in conducting this business, and

it must be presumed, from the nature of the business carried on, that the purchase and use of such casing is so frequent and ordinary in that business that * * * the cause of action should belong to the administrator.

It thus appears that of the four cases upon which defendant relied, two have been overruled upon appeal, and one case in fact upheld the position that the Administrator has authority to sue where a commercial buyer purchases a commodity for use or consumption in his business even though the purchase is not made for resale purposes.

II

The Court erred in concluding as a matter of law that defendant had not violated MPR 136

The District Court concluded as a matter of law that "in said sale by defendant there was no violation by him of Maximum Price Regulation 136" (Conclusion of Law I, R. 11).

Section 1390.3 of MPR No. 136 provides as follows:

Prohibition against dealing in machines or parts, machinery services or the rental of machines or parts at prices above the maximum.
(a) On and after July 22, 1942, regardless of the terms of any contract, lease or other obligation:

(1) No person shall sell, deliver, lease, rent or negotiate the sale or lease of any machine or part, or supply or negotiate the supply of any machinery service, at a price higher than the maximum fixed by this regulation.

(2) No person, in the course of trade or

business, shall buy, rent, lease or receive any machine or part or machinery service at a price higher than the maximum fixed by this regulation.

Beyond any doubt the defendant in this case sold the tractor at a price higher than the maximum fixed by the Regulation, and the Court so found when it declared that "the sales price of \$2,800 for the tractor was in excess of the maximum price provided by MPR 136 in the approximate amount of \$462.50" (Finding of Fact III, R. II). In the face of this finding of fact, it is obvious that Conclusion of Law I must be set aside.

That leaves for determination the measure of damages. Subsequent to the filing of suit, but prior to trial, Section 205 (e) of the Act was amended by Section 108 (b) of the Stabilization Act of 1944. Prior to the amendment once a violation was established, treble damages were mandatory (*Augustine v. Bowles*, 149 F. 2d 93 (C. C. A. 9th, 1945)). Under the amendment (see p. 2, *supra*), if a seller who made the over ceiling sale proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation, "his liability under the Section is established, but may be reduced to the amount of the overcharge, or \$25, whichever is greater." (*Augustine v. Bowles*, *supra*.)

Here defendant pleaded this defense in his amended and supplemental answer (R. 5) but the district court made no finding thereon. For that purpose and for the purpose of assessing damages, the case should be

CONCLUSION

remanded. (See, *Speten v. Bowles*, supra; *Bowles v. Franceschini*, 145 F. 2d 510 (C. C. A. 1st, 1944).)

The decision of the court below is plainly erroneous and opposed to the great weight of authority. To uphold it would subvert the clear policy which Congress attempted to effectuate by enacting Section 205 (e). Accordingly, we respectfully submit that the order of the court below dismissing the complaint should be reversed, and the cause remanded for the purposes indicated above.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

VS.

L. G. TRULLINGER, APPELLEE

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

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Deputy Administrator for Enforcement.

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FILED

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PAUL P. O'BRIEN,

TABLE OF CONTENTS

	Page
Appellee's Statement of the Case.....	1
Summary of Appellee's Argument.....	3
Argument:	
1. Appellant is Not the Proper Party Plaintiff	5
2. The Sales Price was Not in Excess of the Maximum	9
3. Maximum Price Regulation No. 136 does not Apply	11
Conclusion	13

CITATIONS

Page

Cases :

Bowles v. Chew, 53 Fed. Supp. 787.....	5, 8
Bowles v. Joseph Denunzio Fruit Company, 55 Fed. Supp. 9.....	6
Bowles v. Googins, (D.C. Utah 1944), 2 O.P.A. Op. & Dec. 2049.....	5
Bowles v. Glick Brothers Lumber Co., 146 Fed. (2d) 566.....	6, 7, 8
Bowles v. Madl, et al., (D.C. D. Kans) 60 Fed. Supp, 152	6, 8
Bowles v. Malloy, (E.D. Pa.), 2 O.P.A. Op. & Dec. 2112	5
Bowles v. Schille, (U.S. Dist. Ct. E.D. Wis.) 2 O.P.A. Op. & Dec. 2336.....	6
Bowles v. Whayne, (W.D. Ky.) 60 Fed. Supp. 78	6
Lightbody v. Russell, 45 N.Y. Supp. (2d) 515, 47 N.Y. Supp. (2d) 711.....	5
Morgan Sash and Door Co. v. Cullins Lumber Co. (Sup. Ct. Okla.) 159 Pac. (2d) 233.....	6
North Whittier Citrus Association v. National Labor Relations Board, 109 Fed. (2d) 76...	13
Speten v. Bowles, 146 Fed. (2d) 602.....	8
State, ex rel. v. Smith, 111 S.W. (2d) 513.....	13

Statute:

Emergency Price Control Act of 1942, Sec. 205 (e), 50 App. U.S.C.A. Sec. 925 (e).....	3
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In the United States
Circuit Court of Appeals
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CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

vs.

L. G. TRULLINGER, APPELLEE

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

APPELLEE'S STATEMENT OF THE CASE

At the trial of this case Appellee urged that he
was entitled to prevail on three grounds:

(1) Because any cause of action was not in the
Plaintiff Administrator but in the purchaser of the
property involved;

(2) Because the sale (which involved not only a tractor but other items of personal property) was not at a price in excess of the ceiling price imposed by Maximum Price Regulation No. 136, if it applied; and

(3) Maximum Price Regulation No. 136 did not apply to this sale.

Appellant's brief argues the first point only. The second and third points are entirely disregarded. In disregarding the second point Appellant has not only overlooked incontrovertible facts in the case but has materially departed from his theory of the case as outlined in his Statement of Points (R. 140-2).

The brief states that it was admitted in the pre-trial order "that defendant sold *the tractor* for \$2800". There was no such admission in the pretrial order (R. 7, par. (c)). The entire brief proceeds on the assumption that only a tractor was sold, and in conclusion the brief states (page 17) :

"beyond any doubt the defendant in this case *sold the tractor* at a price higher than the maximum fixed by the Regulation," (Italics added)

The evidence is clear, as will hereinafter be pointed out, that Appellee sold not only a tractor but several other items of personal property for the price of \$2800. Appellant's counsel in preparing the record on appeal recognized that the sale involved was not only of a tractor but also of other personal property, because in each of their first six Statement of Points

they refer to the sale of the "tractor and other personal property". The fifth and sixth of the Statement of Points read as follows (R. 141):

"5. That the District Court erred in failing to hold that the sale of tractor *and other personal property* was covered and governed by said Maximum Price Regulation No. 136.

"6. That the District Court erred in finding that the price at which said tractor *and other personal property* was sold by the defendant to said Earl Gilmore, to-wit, \$2800, was not in excess of the maximum price permitted by said maximum price regulation 136." (Italics added)

SUMMARY OF APPELLEE'S ARGUMENT

We summarize our argument as follows:

First: Prior to the amendment of June 30, 1944, not involved in this case, Sec. 205 (e) of the Emergency Price Control Act of 1942, 50 App. USCA Sec. 925 (e), provided that in case of violation of the Act by a sale in excess of a maximum price:

"the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action If the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States."

It is our contention that the purchaser in this case was a "person who buys such commodity for use or consumption other than in the course of trade or

business". Therefore the purchaser was the only party entitled to bring this action.

Second: It is agreed that the sales price was \$2800. We agree that *if only a used tractor had been sold*, and if MPR 136 applied, there would have been an overcharge "in the approximate amount of \$462.50" (see Appellant's Brief page 17, quoting from the court's findings), but it is our contention that other personal property was likewise sold as a part of the same sale and that all the property sold had such a value that, even if MPR 136 be held to apply, the sales price was below the maximum provided by that regulation. To a limited extent it was conceded at the trial (R 134) that property in addition to the tractor was involved in the sale, but as we construe Appellant's Brief even this concession is now withdrawn.

Third: Neither MPR 136, nor any other Maximum Price Regulation applies. Though we elaborated upon this contention before the trial court (R 120-6) it, like our second contention, has been disregarded by Appellant.

ARGUMENT

1. Appellant is Not the Proper Party Plaintiff.

As indicated above, and also in Appellant's Brief (pages 7-8), the question here is whether the purchaser was a "person who buys such commodity for use or consumption other than in the course of trade or business". The purchaser was an ultimate consumer. He purchased for use in connection with his logging operations. He did not purchase for resale.

In addition to *Lightbody v. Russell*, 45 NY Supp. (2nd) 515, 47 NY Supp. (2nd) 711 (R 114-5), which has since been reversed by the Court of Appeals of New York, 293 NY 492, 58 NE (2d) 508, we referred the trial court to the following authorities clearly holding that in a case like the present one the Administrator has no cause of action:

Brown v. Malloy (ED. Pa.) 2 OPA Op. and Dec. 2112 (R 115) (Sale of tractor to farmer)

Bowles v. Googins (DC Utah 1944) 2 OPA Op. and Dec. 2049 (R 117) (Sale of pipe for irrigating purposes)

We also relied upon the language of Judge Goodman of the Northern District of California in *Bowles v. Chew*, 53 Fed. Supp. 787. The purchasers in that case were retailers purchasing for resale and the court properly held that the Administrator had the cause of action, but the language of the court (53

Fed. Supp. at p. 791) clearly indicated that in the case of a purchase by an ultimate consumer, he alone has the cause of action and that the Administrator has the cause of action only when the purchase is by "trades men, i.e., merchants engaged in business, buying and selling between themselves" (R 109-11). Another case to the same effect, referred to by us at the trial was *Bowles v. Joseph Denunzio Fruit Company*, 55 Fed. Supp. 9 (R 112-3).

Since the trial of this case the following decisions have been handed down, all holding that in a case like the present one the Administrator (prior to the June, 1944 amendment) had no cause of action:

Bowles v. Whayne (WD Ky.) 60 Fed. Supp. 78
(Sale of dragline machine to mining company)

Bowles v. Schille (US Dis. Ct. ED Wis.)
2 OPA Op. and Dec. 2336 (Sale of truck to farmer)

Bowles v. Madl, et al. (DC D. Kans.) 60 Fed. Supp. 152 (Sale of farm machinery)

Morgan Sash and Door Co. v. Cullins Lumber Co. (Sup. Ct. Okla.) 159 Pac. (2d) 233
(Court held Administrator and not purchaser had cause of action, but reasoning supports our contention)

None of the above cases are referred to in Appellant's Brief.

That brief properly points out that at the trial we referred to the District Court's opinion in *Brown v. Glick Brothers Lumber Co.*, 52 Fed. Supp. 913, later

reversed by this Honorable Court in *Bowles v. Glick Brothers Lumber Co.*, 146 Fed. (2d) 566. However, we believe we can properly point out that we at that time expressly disagreed with the reasoning of that court, even though it strongly favored our position. We stated that "I don't urge it upon your Honor as being a sound case because I just don't agree with the reasoning of it" (R 106) but that we desired "to call your Honor's attention to the fact that the attorneys for the OPA in this case [i.e. the Glick case] were making exactly the argument I am making here." And also because other courts in criticizing the Glick decision set forth arguments "exactly in accordance with our contentions".

Those contentions made by the attorneys for the Administrator before the District Court in the Glick case, but now repudiated, were summarized by the court as follows (52 Fed. Supp. at page 916) :

"It is the contention of the attorneys for the Administrator that a person who buys a commodity at retail may bring an action for treble damages, but that a retailer, who has had to overpay his wholesaler or producer, cannot bring such an action, and that such right belongs exclusively to the Administrator.

.

"This is so, say the attorneys for the Administrator, because the retailer's purchase of the sugar is 'in the course of trade or business,' and that the retailer's sale to the consumer is 'other than in the course of trade or business'."

And, as we pointed out to the trial court (R 109-12), this is the line of reasoning adopted by the court in *Bowles v. Chew*, supra, 53 Fed. Supp. 787.

Nor did this court hold to the contrary in *Bowles vs. Glick Brothers Lumber Co.*, 146 Fed. (2d) 566. The opinion of this court in that case, as well as the opinions in the *Chew* case and others are analyzed by Judge Vaught of the Federal District Court of Kansas in *Bowles v. Madl*, 60 Fed. Supp. 152. Because the Administrator in that case, as in the present case, relied upon the *Glick Brothers* case the court said "the analysis by the court became highly material". After such analysis the court stated that *Speten vs. Bowles*, 146 Fed. (2d) 602, also relied upon by Appellant in this case (R 12, 18) "is in direct conflict with the case of *Bowles v. Glick Brothers Lumber Company* supra".

The court in the above case of *Bowles v. Madl* said (60 Fed. Supp. at pp. 153) :

"Trade or business as used in the Act means buying, selling, exchanging, or handling articles in any manner for profit. Technically, it might be said that farming is a trade or business but the generally accepted designation is occupation. I see no reason why even if one were engaged in a trade or business and bought articles for use or consumption therein, he would not come under the use or consumption clause. The act uses the phrase 'course of trade or business', clearly indicating that it was the intention of Congress to recognize as one class those who use or consume as ultimate consumers, and as another class

those who trade, traffic, exchange, buy or sell for profit.”

2. The Sales Price was Not in Excess of the Maximum.

As pointed out above Appellant's Brief proceeds on the theory that the only thing that was sold was a tractor. It thus proceeds despite the fact that Appellant's Statement of Points (R 140-142) states that “other personal property”, in addition to the tractor, was sold.

A copy of the Bill of Sale is in evidence, Plaintiff's Exh. 1 (R 75-7), and the court will notice that it is a sale of:

“One Allis-Chalmers Tractor Serial No. WKO 3982 Motor No. 8949. Together with armor—Bull hook and Miscellaneous Parts & Wrenches.”

The evidence is clear that the “armor—Bull hook and Miscellaneous Parts and Wrenches” were actually sold by Trullinger to Gilmore (R 79-89). It was not denied by Gilmore, the purchaser (R 29, 42-4).

This tractor was purchased by appellee from a farmer in eastern Oregon (R 78) in 1942. During that year Trullinger spent approximately \$500 for new parts for the tractor (R 79, 81, defendant's Exh. 2). He used it for approximately thirty or thirty-five days in the season of 1942. In 1943 he put on a new set of tracks at a cost of \$250.00 (R 81-3) and other new parts costing approximately \$250.00, making a total of approximately \$500 in new parts in 1943.

Subsequent to placing the new parts on the tractor it was not used at all—"it never turned a wheel" (R 82). This amount of \$500 for new parts in 1943 does not include labor, which was worth from \$400 to \$500 (R 84). When the tractor was sold there were sold with it an armor guard of a conceded value of \$85.00 (R 134), a bull hook of a conceded value of \$25.00 (R 134), 2 grease guns and some miscellaneous accessories (R 89-9). In addition to all this the used parts that had been taken from the tractor when they were replaced by new parts were likewise sold as replacements (R 84).

Appellant's witness McQuiston, an Allis-Chalmers representative, testified that the nearest comparable diesel tractor now has a list price of \$4250, f.o.b. factory (R 57).

As we understand it, although Appellant's Brief does not mention the matter, it is Appellant's contention that the maximum price for which this tractor could be sold was 55% of the list price new of a comparable tractor f.o.b. factory. The \$462.50 alleged overcharge referred to in Appellant's Brief (page 17) and also in the court's findings (R 11) was obviously arrived at as follows:

Sales Price	\$2800.00
Price of new comparable Tractor f.o.b. factory \$4250.00	
55% of new price.....	2337.50
	<hr/>
Alleged over charge.....	\$ 462.50

But this does not take into consideration any of the personal property—the armor guard, \$85.00; the bull hook, \$25.00; the grease guns, \$35.00; the new track, \$250; nor any of the miscellaneous parts or wrenches, of which there was no testimony as to value.

Under the above facts, Appellant certainly proved no case that the sales price of all this personal property was in excess of any maximum fixed by the OPA.

3. Maximum Price Regulation No. 136 does Not Apply.

Appellee was charged in the complaint, and is now charged, with violating Maximum Price Regulation No. 136. This regulation purports to cover “machines and parts and machinery services”. It consists of 26 large pages of exceedingly fine print. But at this late stage of the proceedings Appellant has never pointed out the exact provisions of this lengthy regulation that he claims were violated. He did not do it at the trial. He has not done it in his brief in this court.

Though we found it almost an impossible task, we endeavored to analyze this long, detailed regulation, and we presented our analysis to the trial court (R 120-5). Appellant had three attorneys representing him at the trial, and three additional counsel appear on the brief, but at no time did anybody representing Appellant point out the language of the regulation that it is claimed had been violated.

One would expect a tractor to be listed under the heading "Prime Movers", or possibly "Industrial and Marine Power Apparatus", or if not there, then under "Processing Machinery and Equipment" (MPR 136, page 18). But it is not listed under any of these designations.

One would hardly expect a tractor, originally used by a farmer, and now used by a small logger, to be listed under "Construction and Mining Machinery", but this is the only place that any tractor is listed (MPR 136, page 19). There we find "Crawler and Non-Agricultural Tractors". We assume, because it has a track, that the tractor involved is a "crawler" type of tractor, but it can hardly be designated a "Non-Agricultural Tractor", for the evidence is that it was originally used by a farmer.

Then on page 2 of the regulations, paragraph 1390.2, are listed "Exclusions". Under these exclusions it is stated that the regulation does not apply to:

"(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof"

But later in the paragraph a sale "at retail" is defined as "when made to an ultimate consumer, other than an industrial, commercial, or governmental user"

As pointed out at the trial (R 124-6) it is very doubtful whether Gilmore, the purchaser, can come

under the designation of "an industrial, commercial, or governmental user". *State, ex rel, vs. Smith*, 111 SW (2d) 513; *North Whittier Citrus Association vs. National Labor Relations Board*, 109 Fed. (2d) 76 (9th Circ.).

We do not believe we are justified, in the absence of any analysis by Appellant, in devoting more space to a discussion of all the provisions of this lengthy MPR 136. We merely express the hope that at some time the Office of Price Administration will explain to appellee the exact language of the lengthy regulation which he is claimed to have violated, or explain why the court was in error when it found that "in said sale by defendant there was no violation by him of Maximum Price Regulation No. 136" (R 11).

CONCLUSION

We very much regret that Appellant's Counsel did not see fit either at the trial or in their brief in this court to discuss the second and third contentions set forth above. After all, the burden should be on them to prove that a violation has taken place, and not upon the citizen complained against to prove the contrary.

If the court holds with Appellee on any one of his three contentions, the judgment of the trial court should be affirmed. If the court disagrees with all our contentions, we, of course, agree with Appellant that

the case should be remanded for the purpose of assessing damages (Appellant's Brief 17-8).

Respectfully submitted,

CAKE, JAUREGUY & TOOZE,
NICHOLAS JAUREGUY,
Attorneys for Appellee.

No. 11015

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

LIGHTHOUSE OYSTERS, INC., an Oregon
Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUL 2 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11015

United States

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	4
Appeal:	
Certificate of Clerk to Transcript of Record on	108
Designation of Record on (CCA)	111
Designation of Record on (DC)	17
Notice of	15
Order Concerning Printing of Transcript on	113
Statement of Points on	109
Stipulation re Exhibit on	112
Certificate of Clerk to Transcript of Record on Appeal	108
Complaint	2
Designation of Record (CCA)	111
Designation of Record (DC)	17
Findings of Fact and Conclusions of Law	13
Judgment Order	14
Memo of Decision	12
Names and Addresses of Attorneys of Record	1

Notice of Appeal	15
Order Concerning Printing of Transcript.....	113
Order to Forward Exhibits	16
Pretrial Order	6
Statement of Points	109
Stipulation re Exhibit on Appeal.....	112
Trial Proceedings	19

Witnesses for the Defendant:

Hughes, Tommy	
—direct	64
Jaha, Joe	
—direct	56
—cross	61
—redirect	64
—recalled, direct	91
—cross	92

Exhibits for the Plaintiff:

2—Compilation of Purchases	37
3—Table—Salmon Prices	40

Witnesses for the Plaintiff:

Holdt, Theodore J.	
—direct	33
—cross	45

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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ALTON JOHN BASSETT,

1022 Corbett Bldg., Portland 4, Oregon,

for Appellee.

In the District Court of the United States
for the District of Oregon

Civil No. 2427

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

LIGHTHOUSE OYSTERES, INC., an Oregon
Corporation,

Defendant.

COMPLAINT

Count One

I.

Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States pursuant to the provisions of Section 205(e) of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), enacted January 30, 1942, hereinafter called the Act.

II.

Jurisdiction of this court is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

III.

At all times since July 13, 1943, there has been in effect, pursuant to the Act, Maximum Price Regulation 418, as amended (duly published in the Federal Register prior to the acts herein com-

plained of) hereinafter called the "Regulation", establishing maximum prices for fresh fish and seafood sold by producers and wholesalers.

IV.

From and after the 13th day of July, 1943, to the date of this complaint, defendant, doing business as Lighthouse Oysters, Inc., has been and now is a service and delivery wholesaler as defined in the Regulation, with his principal place of business at 111 Southwest Front Street, Portland, Oregon.

[1*]

V.

Since July 13, 1943, defendant has, on numerous occasions, within the District of Oregon and elsewhere, sold and delivered to certain retail dealers fresh fish and seafood at wholesale at prices higher than the maximum prices therefor established by said Regulation and the amendments thereto.

VI.

The transactions referred to in Paragraph V occurred more than six months after the date of approval and enactment of the Act. None of said sales was made for use or consumption other than in the course of trade or business.

VII.

Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in Paragraph V and VI of this Count

*Page numbering appearing at foot of page of original certified Transcript of Record.

exceed the maximum prices provided by Maximum Price Regulation 418, as amended, equals Nine Thousand Four Hundred and Fifty One and 74/100 (\$9,451.74) Dollars.

Wherefore, plaintiff prays for judgment on behalf of the United States against the defendant in the sum of Nine Thousand Four Hundred and Fifty One and 74/100 (\$9,451.74) Dollars.

(S) CECELIA P. GALLAGHER
Of Attorneys for Plaintiff

[Endorsed]: Filed April 28, 1944. [2]

[Title of District Court and Cause.]

ANSWER

FIRST DEFENSE

I.

Defendant admits Paragraphs I, II, and III of plaintiff's complaint except that plaintiff alleges the regulations referred to in Paragraph III were changed from time to time during the period covered.

II.

Defendant denies Paragraphs V, VI and VII and alleges that it never sold any goods in excess of the maximum price.

SECOND DEFENSE

Defendant alleges that the plaintiff circulated new, different and inconsistent interpretations to

the said regulations on countless and innumerable occasions and the Oregon wholesale and retail fish trade could not, except by chance, observe the rules and regulations concerned in this litigation.

THIRD DEFENSE

Defendant through its various agents appeared at the offices and before the staff members of plaintiff voluntarily on many occasions and offered to comply with any and all of the said regulations and has done so.

Wherefore, defendant demands that this action be dismissed and that it recover costs.

(S) ALTON JOHN BASSETT
Attorney for Defendant.

Endorsed]: Filed May 16, 1944. [3]

State of Oregon,
County of Multnomah—ss.

I, Joe Jaha, being first duly sworn say that I am the defendant in the within entitled cause and the foregoing answer is true as I verily believe.

(S) JOE JAHA

Subscribed and sworn to before me this 16th day of May, 1944.

[Notarial Seal]

(S) ALTON JOHN BASSETT
Notary Public for Oregon.

My Commission Expires 8/17/45.

Due service of the foregoing answer by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the ... day of May, 1944, hereby is accepted.

CECELIA P. GALLAGHER

By W. A. STOCKMAN

Attorney for defendant. [4]

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on regularly for Pretrial Conference before the Honorable James A. Fee, one of the Judges of the above entitled Court, on Wednesday, July 12, 1944. Plaintiff appeared by Cecelia P. Gallagher, of counsel, and defendant appeared in person and by Alton John Bassett, his counsel.

Plaintiff's complaint sets forth one cause or claim against the defendant based on alleged violation of Section 4(e) of the Emergency Price Control Act of 1942 (Pub. L. No. 421, 77th Cong. 2nd Sess. 66 Stat. 23) as amended, and violations of the provisions of Maximum Price Regulation 418, as amended, effective now and from and after the 13th day of July, 1943, promulgated and duly put into effect pursuant to the provisions of said Act, and duly published in the Federal Register (8 F. R. 9366) prior to the acts herein complained of. This action is brought pursuant to Section 205(e) of the Act.

ADMITTED FACTS

Pursuant to the agreements and stipulations made at said conference, it is ordered that the following facts shall be considered as admitted and established. [5]

I.

Maximum Price Regulation 418 (hereinafter referred to as the Regulation), as amended, was duly promulgated and put into effect in accordance with the provisions of the Emergency Price Control Act of 1942, as amended, (Pub. L. No. 421, 77th Cong., 2nd Sess. 66 Stat. 23) and that jurisdiction of this Court over the count set forth in plaintiff's complaint herein is conferred by Section 205(c) of said Act.

II.

The Regulation establishes legal maximum selling prices of various species of fresh fish and seafood including the commodities listed in Plaintiff's Pretrial Exhibts 1 and 3. The defendant made numerous sales of said commodities in the course of trade between the dates of August 8, 1943, and December 31, 1943, on the dates per invoice number in the amounts and at the prices set forth in Plaintiff's Pretrial Exhibit 1.

III.

Defendant has furnished to plaintiff the duplicate original sales invoices kept by defendant; said sales invoices represent all the sales of fresh fish and seafood made by defendant between the periods of August 5 and December 31, 1943. Plain-

tiff has made a tabulation of said sales invoices on yellow sheets numbered 1 through 23; Column I of said tabulation shows sales invoice numbers; Column II shows dates of sale; Column III shows species and amounts sold and the prices charged therefor. Columns I, II and III represent a full, true and correct summary of the contents of defendant's sales invoices. The above described yellow sheets numbered 1 through 23 may be introduced as plaintiff's Pretrial Exhibit 1 in lieu of any original or duplicate original sales invoices.

IV.

The remaining columns of figures shown on Plaintiff's Pretrial Exhibit I are computations made by plaintiff and purport to show the maximum prices of each species of fresh fish listed, and the total amount of the alleged overcharges. Defendant does not admit the accuracy of those remaining figures. [6]

V.

Defendant has furnished to plaintiff his purchase invoices which represent all the purchases of fresh fish and seafood made by defendant between the dates of August 5 and December 31, 1943. Plaintiff has made a tabulation of the purchases of the species of fresh fish listed in Plaintiff's Pretrial Exhibits 1 and 3 on yellow sheets numbered A through C. Said tabulations represent a full, true and correct summary of the contents of such purchase invoices. The yellow pages numbered A through C may be introduced as plaintiff's Pretrial

Exhibit 2 in lieu of any original or duplicate original purchase invoices.

VI.

The sales tabulated in plaintiff's Pretrial Exhibit 1, from August 5 to December 31, 1943, were subject to the ceiling prices established by Maximum Price Regulation 418, as amended.

VII.

Plaintiff's Pretrial Exhibit 3 is a table of prices for the species of fresh fish listed in Column III of plaintiff's Pretrial Exhibit 1, taken from Table E of Maximum Price Regulation 418, as amended, and represents the correct maximum prices for those species, sizes and types of dress listed in plaintiff's Pretrial Exhibit 3.

VIII.

Defendant did not specify in his invoices the sizes, grades and styles of dress of the fresh fish he sold, as he is required to do by Section 13(b) of said Regulation. That as the statement furnished the purchaser at the time of delivery did not identify the size, grade and style of dressing, the maximum price which may be charged for the fresh fish involved in the sale after November 3, 1943, is the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish sold.

DISPUTED FACTS

It is further ordered that the following facts are in dispute and constitute the issues of fact to

be decided at the trial of his case [7] upon the exhibits theretofore submitted and evidence offered at said trial.

I.

The proper and legal selling prices for the species of fresh fish set forth in Column III of plaintiff's Exhibit 1. It is plaintiff's contention that the maximum prices for the species listed in Column III of plaintiff's Pretrial Exhibit 1 should be those prices listed in Column V of plaintiff's Pretrial Exhibit 1.

II.

The total amount by which the consideration of each of said sales exceed the lawful maximum price therefor, if in fact, such consideration did exceed such a maximum price. It is defendant's contention that it is free of any violation as charged by the complaint of the plaintiff.

III.

It is contended by the defendant that any charges in excess of the maximum price which may be shown herein were not made wilfully or with knowledge that it was charging more than the ceiling price, but that such overcharges, if any, were made innocently. It is plaintiff's contention on this point that defendant was both wilful and negligent in collecting more than the maximum prices for the fresh fish it sold.

EXHIBITS

The following exhibits are identified and offered by the plaintiff:

Pretrial Exhibit 1, plaintiff's computation contained on yellow sheets numbered 1 through 23. Columns I, II and III of said exhibit represent a full, true and correct summary of the contents of defendant's sales invoices. Columns IIV and V of said exhibit represent plaintiff's computation of maximum prices for each species and fresh fish listed in Column III and the total amount of the alleged overcharges.

Pretrial Exhibit 2, plaintiff's compilation contained on yellow sheets numbered A through C, which represent defendant's purchases of the species of fresh fish listed in plaintiff's Pretrial Exhibits 1 and 3. Said [8] compilation represents a full, true and correct summary of the contents of such purchase invoices.

Pretrial Exhibit 3, a table of prices for the species of fresh fish listed in Column III of plaintiffs' Pretrial Exhibit 1, taken from Maximum Price Regulation 418, as amended.

This Order sets forth and defines all the issues presented by this case and it supersedes the pleadings filed herein and said pleadings shall be of no further effect. No additional issues are to be raised by either party except upon stipulation by the parties with the approval of the Court, or as authorized by the Court in the interests of justice.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed October 12, 1944. [9]

In the District Court of the United States
for the District of Oregon

Civil No. 2427

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

LIGHTHOUSE OYSTERS, INC., an Oregon cor-
poration,

Defendant.

MEMO OF DECISION

I allow single damages for the items prior to November 9, 1943, less two cents (2c) per pound in every case. I do not agree with plaintiff's interpretation of the amendment dated November 9th, and for that reason do not allow recovery after that date.

Dated October 14, 1944.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed Oct. 14, 1944. [10]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for trial before me this 12th day of October, 1944, plaintiff appearing by Cecelia P. Gallagher, his attorney, and the defendant, Lighthouse Oysters Inc., and Joe Jaha, appearing by Alton John Bassett, their attorney, and the parties having heretofore agreed to a pre-trial order and issue having been joined on the facts in dispute therein, and the plaintiff, by leave of Court, having amended his complaint by substituting for the words and figures \$9451.74 that occur in Paragraph VII and the prayer, the words and figures \$6132.47, and testimony having been taken in regard thereto, and the Court having heard the arguments of respective counsel and now being fully advised in the premises makes the following

FINDINGS OF FACT

1. That the total alleged overcharges claimed (single damages) amount to \$2047.49.

2. That the total alleged overcharges prior to November 9, 1943 are in the sum of \$974.49 and the total alleged overcharges subsequent to November 9, 1943 are in the sum of \$1073.00.

3. That the defendant has overcharged as alleged in the complaint and as is indicated on plaintiff's exhibit "1" prior to November 9, 1943.

4. That the defendant is entitled to a credit of

\$0.02 per pound as a set off against said overcharges prior to November 9, 1943.

5. That the violation of the regulation, orders and price schedules resulting in said overcharges was not wilful and was not the result of failure to take reasonable precautions against the occurrence of the violation. [11]

From the foregoing facts the Court concludes.

CONCLUSION OF LAW

That the plaintiff is entitled to single damages for the items prior to November 9, 1943 amounting to \$974.49, less the sum of \$721.90, the sum arrived at by multiplying 36,095 pounds times \$0.02, or damages of \$252.59. CMc.

Let judgment be entered accordingly.

Dated at Portland, Oregon, this 11th day of December, 1944.

CLAUDE McCOLLOCH

United States District Judge

[Endorsed]: Filed Dec. 11, 1944. [12]

[Title of District Court and Cause.]

JUDGMENT ORDER

The above cause came on for trial on the 12th day of October, 1944, before the Honorable Claude McCulloch, Judge of the above entitled Court, without a jury, the plaintiff appearing in person and through his attorney Cecelia P. Gallagher, and the

defendant appearing personally and through his attorney Alton John Bassett; witnesses having been sworn and having testified on behalf of plaintiff and defendant, and the Court having heard the testimony of witnesses and arguments of counsel, and having heretofore set out and entered Findings of Fact and Conclusions of Law,

Now, therefore, based upon said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered and Adjudged that the plaintiff recover single damages in the sum of \$252.59.

Dated this 11th day of December, 1944.

CLAUDE McCOLLOCH

United States District Judge

[Endorsed]: Filed Jan. 19, 1945. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Lighthouse Oysters, Inc., an Oregon Corporation, defendant above named, and to Alton John Bassett, its attorney:

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment awarding plaintiff single damages in the sum of \$252.59, made and entered

in the above entitled action on the 11th day of December, 1944.

Dated at Portland, Oregon, this 24th day of February, 1945.

/S/ F. E. WAGNER

/S/ W. DUNLAP CANNON, JR.

Attorneys for Appellant Chester Bowles, Administrator

[Endorsed]: Filed Feb. 24, 1945. [14]

[Title of District Court and Cause.]

ORDER TO FORWARD EXHIBITS

It appearing necessary that the original exhibits in the above described cause accompany the transcript of record upon appeal to the Circuit Court of Appeals for the Ninth Circuit,

It Is Ordered that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all original exhibits introduced in evidence in this cause.

Dated at Portland, Oregon, this 22nd day of March, 1945.

CLAUDE McCOLLOCH

Judge

[Endorsed]: Filed March 22, 1945. [15]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff's Appellant Chester Bowles, Administrator, Office of Price Administration, hereby designates for inclusion in the record on appeal taken by appellant from the final judgment herein the complete record and all the proceedings and evidence in the action including, without limitation, the following:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Pre-trial order.
4. Transcript of trial proceedings of October 12, 1944.
5. Order to send exhibits introduced in evidence.
6. Memorandum opinion October 14, 1944.
7. Findings of Fact and Conclusions of Law.
8. Judgment Order, December 11, 1944.
9. Notice of Appeal.
10. This designation.

Dated at Portland, Oregon, this 20th day of March, 1945.

/S/ DAVID LONDON

/S/ F. E. WAGNER

Attorneys for Appellant Chester Bowles, Administrator

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Designation of Record is hereby accepted in Portland, Multnomah County this 20th day of March, 1945, by receiving a duly certified copy thereof.

ALTON JOHN BASSETT

Of Attorneys for Defendant
[17]

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2427, in which Chester Bowles, Administrator, Office of Price Administration is plaintiff and appellant, and Lighthouse Oysters, Inc., an Oregon Corporation is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of the testimony taken in this cause together with exhibits 1, 2, and 3.

In Tesimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 24th day of March, 1945.

[Seal] LOWELL MUNDORFF,

Clerk

By F. L. BUCK

Chief Deputy Clerk

Portland, Oregon, Thursday, October 12, 1944.

10:00 o'clock A. M.

Before:

Honorable Claude McColloch,
Judge.

Appearances:

Miss Cecelia P. Gallagher,
Enforcement Attorney,
Office of Price Administration, Portland
District, appearing for the Plaintiff.

Mr. Alton John Bassett,
Attorney for the Defendant.

PROCEEDINGS

The Court: All right. We will go ahead with this case.

Miss Gallagher: If your Honor please, in the

case of *Bowles vs. Lighthouse Oysters, Inc.*, this case is an action for treble damages brought under section 205 (e) of the Emergency Price [1*] Control Act. The claim for treble damages is based upon the sales of *Lighthouse Oysters, Inc.*, the defendant, who is a wholesaler of fresh fish and sea food to retailers and restaurants. The sales were made in the course of trade or business.

Maximum prices for fresh fish and sea food are set in dollars and cents by Maximum Price Regulation 418.

The Administrator alleges that the defendant sold fresh fish at prices which exceeded his maximum prices and that the total amount of the overcharge was \$3150.25.

We move to amend our complaint and to amend the prayer of our complaint to show that the overcharges are, after they have been recomputed, \$2047.49.

The Court: They may be amended.

Miss Gallagher: This matter came to our attention in December of 1943 upon the complaint of some retailers who had bought from the *Lighthouse Oysters, Inc.*, that they had been overcharged. Mr. Joe Jaha, who is either the corporation—acts in the capacity of a manager—was called into the Office of Price Administration for a discussion of the complaint that we had received. At that time Mr. Bassett, or Mr. Jaha, indicated that it was the first time he had ever been in the Office of Price Administration; it was the first time he had ever been in the Enforcement Divi-

*Page numbering appearing at top of page of original Reporter's Transcript.

sion, and it was his statement it was the first time he had ever been in the Price Division.

Within a week after that Mr. Bassett, who is appearing [2] for the defendant, called and said he would like to discuss the matter and see what we could do to iron it out.

Thereafter, in January, Mr. Bassett and Mr. Jaha were in my office. We discussed in a good deal of detail Mr. Jaha's method of keeping records, his method of making invoices. I explained the detail to both Mr. Bassett and to Mr. Jaha, what the requirements were, gave him a written-out sample of how he should keep them, and asked him at that time if we could examine his books and records. He said we could, and on the middle of January, 1944, an examination was started.

There were further discussions between Mr. Bassett and me from the time, all during the period since that, during February, during March.

During March Mr. Holdt, an investigator in our office, who will be our witness today, re-examined the books, because the first investigator who had made the examination was no longer in our office but was in the eastern part of the United States, unavailable.

Then in April of this year we filed our complaint. A pre-trial order has been entered and we are now before you for trial.

Regulation 418 has very carefully spelled out the requirements for keeping record by those who

buy fresh fish and sea food and those who sell it. This requirement applies only to the producers of fish and the various wholesalers of fish and does [3] not cover consumer buying, nor does it cover the retail stores.

Section 16 requires that every person making a sale shall furnish to the purchaser a copy for inspection, a written statement which shows, first, the date of the sale, the name and address of the buyer and the seller, the species sold, whether it is Chinook, under salmon particularly; and that is what we are dealing with today; whether it is Chinook, silverside, blueback, or a number of other kinds; the quantity sold, the size of the fish; the grade of the fish and the style or dressing; the price charged for the fish; and it further provides that if there is included a charge for boxing or for transportation, or for the state privilege tax that has been paid, that extra charged may be added to the price of the fish and it must be shown separately on the invoice.

On November 9th, 1943, an amendment, No. 16, was added to the regulation, which said that if the invoices failed to show the required information which we have just outlined, then the price which may be charged is the maximum price for the lowest priced size, grade and style of dressing of the species sold.

When we started our computation on this case we found that the invoices of the defendant were defective. They did not carry at all the required information. A typical examination of an invoice

would be a printed copy showing the name of the seller in printing, the name of the buyer, in almost all cases Jones, Peters—no address. That, of course, is not a fatal defect, [4] as far as the merits of the thing are concerned. It is a defect but it is not as serious as defects that I will now describe.

The invoices were printed on the side oysters, salmon, halibut, fillets; then there is room at the bottom for writing the other kind of fish in there, and I think without exception his invoices would show either salmon in printing, nothing further, and then 17 pounds at 35c a pound, or whatever the price charged, whatever the poundage sold, or it would show the printed word "Salmon" following that Chinook, either abbreviated or not, silvers and other species, without in any way indicating whether the fish was troll-caught or seine-caught; whether it was sold in round, just as it came from the river; whether it was sold drawn, with its head on, or dressed or steaks, or any other kind of a description which would make it possible to determine, either for the Office of Price Administration to determine or his customer to determine, what had been sold to him unless a notation was made by the customer at the time of the sale.

The reason that it is important to indicate the style of dressing, whether it is drawn, dressed or round, the size and the species, whether it is sold fall, pink, sockeye, Chinook, troll-caught or seine-caught, is that each species, each type of dressing and the method of keeping it, and in some in-

stances whether it is under or over $12\frac{1}{2}$ pounds, carries a different price, so that the notation that it is salmon 40 pounds, or Chinook 40 pounds, comes very short of showing the required [5] information.

When we came to make our computations of the overcharges in this case we were faced with an extreme difficulty, so we adopted this method: We read the invoices as they were made out. When we found that there was salmon sold at 35c a pound we used the name and the price that the defendant had used for selling as our basis for classification of the fish. We went through the schedule of prices and chose the fish which would come within the 35-cent bracket or as close to it as we could. If fish was sold at 17c it would be obvious he would be selling a 35- or 33-cent fish for 17c, so we took, not Chinook but a silver or another species that came within that price range. Then for all the computations between the 5th day of August, which is the first sale in August, and the 9th of November, which is the date of the amendment No. 16, which requires then that he take the lower price, we gave the defendant the benefit of any doubts that we could by giving him the highest dressed price of the type of fish most closely classified by his own name and his own prices. That gives the defendant credit for having sold between August 1st and November 9th nothing less than dressed fish on every sale. Dressed, of course, is the highest priced of the three types of dressed we have computed, round, drawn, and dressed. I

think that probably the defendant himself would admit that in many instances he sold drawn fish or that he sold round fish, but it is impossible for us to prove what he sold. His own [6] records don't show it, so we have given him the higher price, the dressed price.

On fillets that he has sold, when they have indicated on the invoice that they are fillets there is no indication whether it is salmon fillets or other kinds, we have not computed these overcharges. We have assumed the prices were correct and left them out. So actually the defendant has had credit, by our failure to include them in our overcharges, for any fillets that he may have sold.

We feel that we have given to the defendant on those sales the benefit of every reasonable doubt. Instead of trying to hold him down to a lower price, which we might reasonably hold him to under the theory that he has made an admission by his conduct, by his failure to classify, failure to keep his records correctly, that he has actually sold at a lower price, since if he had been selling at a higher price he would, if he were reasonably prudent, have indicated the information which would have allowed him to claim the higher price.

After November 9th we used the lowest price for the style of dress, and if there were any doubts which we could not in our own minds fairly resolve, we gave to the defendant all the benefit we could on it. He failed to include on his invoices any separate notation that he was passing on a box charge, freight charge or tax charge. In order

to give him full credit for any of those charges he may have paid and may have rightfully [7] passed on, we examined what he submitted to us as all his purchase invoices, and totaled all the freight he paid, all the box charge he paid, all the tax he paid, as shown on his purchase invoices, subtracted that total from our total computed overcharges, and adopted that charge.

The issues of facts in the case have been pretty well narrowed down by the pre-trial order. They cover first the proper and legal ceiling prices for the species of fresh fish set forth in Plaintiff's Exhibit 1. It is our contention that the maximum prices listed on the exhibit are the prices which should be allowed as ceiling prices. They dispute of course—it is disputed between us—the total amount which he actually overcharged, if, in fact, he has overcharged. It is plaintiff's contention that he has overcharged.

The defendant urges that any charges made in excess of the ceiling prices were not willful and were made without knowledge. The defendant contends that.

The pre-trial order has admitted facts.

The defendant furnished to us his sales invoices. Our investigator copied them onto the work sheets and copied them in this manner. Column 1 showed the invoice number; column 2 showed the date of sale; column 3 showed the fish sold, the type of fish sold, the number of pounds and the price charged for them. As to those first three columns it has been stipulated in the pre-trial order that

these figures are a correct transcription from the [8] defendant's records and that they may be admitted. The remaining columns on Exhibit 1 are contested. They show what we claim to be ceiling prices and what we claim to be the overcharges.

We have also computed in our Exhibit No. 2 the defendant's purchases, and it has been stipulated that those are a correct transcription of the purchase records furnished by the defendant and that they may be introduced in evidence.

Our Exhibit 3 is a sheet which shows the ceiling prices for various species of fish under consideration here. These prices are taken from the regulation, taken from what is called Table E, the proper table of prices by which the defendant at that time could sell. We copied it onto that to make it easy to follow, because the price schedules are complex and hard to follow in fine print. It has also been stipulated that is a correct transcription of the ceiling prices, and that that may be offered into evidence.

We have prepared photostatic copies of our Exhibit No. 1, because it is large; it is hard to follow, and we have a copy for your Honor and a copy for Mr. Bassett, which I shall hand to you when we start to introduce our exhibits.

That is my opening statement, your Honor.

Mr. Bassett: If it pleases the Court, I have never worked harder or longer on a case during my fifteen professional years and felt less prepared

than I do in this case; and I don't blame my modest ability for all of that. The OPA, as it applies to [9] the fish industry, has made it impossible for any two fishermen to agree upon the price of the specific species of fish at a certain grade; and it has likewise made it impossible for any two OPA witnesses on the Pacific Coast to agree.

Joe Jaha, the defendant in this case, the Lighthouse Oyster, Inc., is a very small, we might say, fish monger. His is the oyster business, and as an incident to that business, and as an accommodation to his customers, he wholesales fish on such a small scale that it is customary, not exceptional but customary for him to cut a fish to sell to a restaurant that requires a portion of one fish. It has during this nearly half year covered by this suit sold approximately 150,000 pounds of fish, and from that 150,000 pounds he has deducted all that which was dressed, all of that which was filleted, and all of that which was spoiled, so he is just a small fish monger. He has been in business in Portland for fifteen years in this business, oysters principally. He has had one bookkeeper until about a year ago, when that bookkeeper left, a man and wife, and he had to employ another. He has had the small and many large dealers up to the advent of the OPA this way: He would go to the source of supply and buy his fish at the lowest price he could get it for. He kept a record of that carefully, because he has to pay the State of Oregon a certain per cent of every pound he buys. That, of course, has always been done. But from

there on it is a matter of making out an invoice to whoever is buying fish, such and such kind, so [10] many pounds of salmon at so much money. Now when he had to call his bookkeeper in and his peddlers—he has two peddlers who go up and down the street to his accounts and say, “Do you want any fish today?” and then the order is made, your Honor, when that restaurant says, “Yes, we will have a third of a salmon.” “How big is the salmon?” first they will ask. Then if it is twenty pounds and they want ten pounds they will say, “We will take half a salmon.” At that point the invoice is made and it can’t be made until then.

The only information that the seller can have is what the peddler brings back to him. It has been impossible to teach his bookkeeper what he didn’t know, and it has been impossible to teach these fish peddlers how to make out an invoice.

Your Honor, there is not a fish house in Portland that has not done business the way we have done it. Every fish house in Portland has done the same way. They have had their reform periods when they tried to learn from the OPA what they had to do, but it has not been long until they slipped back to ten pounds of salmon at so much a pound. That has just been in the fish business on the Pacific Coast for seventy-five years.

Now is is not that simple, either, your Honor. The further difficulty in complying with what the plaintiff is saying the law is, is this: The OPA, instead of setting a ceiling price on fish at a certain place have gone into the business from the

ocean. They have said that a man fishing out on the ocean will [11] correspond with A on their table of buy and sell. A is the C.R.P.A., Columbia River Packers Association, on the dock; the cannery is B. He sells to a big primary wholesaler, who is C, who in turn sells to a secondary wholesaler, who is D. D in turn sells to the retailer, who is E. Then they said that A or B could jump over the intervening letters and sell to E at the high price, which of course all the fishermen will do when the market is scarce. When the supply is scarce and it is possible for them to do that they span the intervening letters and sell to the lowest letter, which is the highest price they can.

But inverting that, Schedule E could only pay B the B price. In other words, E and D and C were foreclosed from competing on the supply and demand market.

Then, your Honor, it is complicated further. There are, say, a hundred types of fish sold on the Portland market, including sea foods. They are sold round, meaning in their natural state, or they are sold dressed, with their heads and tails removed, and their visceral area, or they are sold further filleted, with their bones removed, their carcass, each of those having a different price.

Then, your Honor, they are sold either fresh, as removed from the river, or comparatively fresh, or frozen.

They are also sold from different points.

They are also sold in or out of the box, with ice. They are also sold in a state where there is a sales tax, [12] and in states where there are none. That is, they are purchased by this man.

Now then, he starts selling. Well, he reverses that whole schedule again, and all the things that he had to take into consideration when buying, he has to add to those he must take into consideration when selling.

There are no two experts in Portland, Oregon, for example, your Honor, among the wholesale or retail fishermen, or the fishermen themselves, who could be brought before your Honor and agree upon any rule of the OPA that applies to the fish business.

Of course, the OPA issued—first, there is the law; then, to put that law into effect, there were rules and regulations promulgated. But that, your Honor, was only the beginning. Then those men who are conscientious, honest businessmen, asked themselves, “What does this mean?” And they would go to their OPA in Portland, or Seattle, or San Francisco, or Los Angeles, and they would ask them, and the first when this was going on last year I was at their meetings in the OPA. I am not, of course, entitled to testify but they will, that they didn’t have any idea how these rules would be applied, nor did they, during the summer this law was issued, was distributed and circulated in August, about August 15th finally after some talk in July—all during the summer months and in the fall and into the winter the interpretation, which means how I am going to sell, and for how much,

depended upon whom you asked. So all the fishermen [13] did like they have always done—they asked each other, compared notes and then compared with the OPA. The OPA was then reading back to them the rule. Well, that is right of course where they started. Then later on they started giving them interpretations, and instead of clarifying it it just muddied the waters. No two dealers in Portland today know many of the rules that the OPA applies to the selling of fish.

Now our defense is, first, of course, that we have not been willful or malicious. We have rushed up to the OPA with all our books and laid them on their desk and said, "Here are our records." Well, those, instead of being self-serving instruments, seem to have been admissions against interest. We brought all our records to the OPA. They prepared our case. There is not a letter in this case, your Honor, except the law, that we didn't gladly and willingly give to the OPA to make their case out. We left our business for hours at a time to sit with this gentleman here who is going to testify; left our business to try to get all of our records for him and to explain at least what we meant by our bookkeeping system.

We claim that the OPA have disinterpreted their own rules, and we claim that they have computed incorrectly, and we claim that, because of their lack of knowledge of the fish business, they did not take into consideration the items I spoke of that reduced, of course, the amount of fish you buy to the amount you sell, which is considerable—20 to 30 per cent

when we [14] fillet, sometimes 50 per cent; 15 to 30 per cent when we dress. So when they say we bought 150,000 pounds of fish we can't account to them for 150,000 pounds unless they understand that those fish were dressed down to 50,000 to 75,000 pounds.

We didn't do it knowingly, because we don't know yet, the exact interpretation of many of these rules, and we didn't do it wilfully because we have to know how to do it to do it wilfully; and finally, your Honor, the books of this defendant show that many, many times he charged less than he could have or should have, because he didn't understand. Thousands and thousands of pounds were sold because he said, "Well, I guess that is my ceiling price and, although I am losing money on it, I have to sell it for that."

That we are going to offer, your Honor, as evidence it was not done wilfully.

The Court: All right.

THEODORE J. HOLDT

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination

By Miss Gallagher:

Q. Will you state your name, Mr. Holdt?

A. Theodore J. Holdt.

Q. Will you state your position, please, Mr. Holdt?

A. My position is investigator for the office of

(Testimony of Theodore J. Holdt.)

Price Administra- [15] tion, Portland District Office.

Q. How long have you been such an investigator?

A. Since March 1, 1944.

Q. State whether or not you have specialized in any particular commodity. A. I have, in fish.

Mr. Bassett: Pardon me. What date did he give?

Miss Gallagher: March.

Mr. Bassett: I didn't hear you, Mr. Holdt.

The Witness: March 1, 1944.

Miss Gallagher: Q. Will you state what you have specialized in?

A. I have specialized in fish.

Q. Do you know of your own knowledge where the defendant's place of business is located?

A. I do.

Q. Will you state where it is, please?

A. Portland, Oregon.

Q. Do you know of your own knowledge, from your examination of defendant's records, what classification the defendant's business is under the regulation? A. I do.

Q. Will you state what that is, please?

A. It is wholesale dealer in fish and sea foods.

Q. And what classification under the regulation? Is he a primary [16] fish shipper, or is he—

A. Well, he is a service and delivery wholesaler.

Q. In the course of your duties have you investigated the books and records showing the sales of fish by the defendant in this case? A. I have.

Q. Of what did your investigation consist?

(Testimony of Theodore J. Holdt.)

A. The investigation consists of examination of the sales invoices and the purchase invoices, and a transcription of those invoices onto work sheets.

Q. You have stated the results of your examination are computed on work sheets?

A. The results are computed on work sheets, yes.

Miss Gallagher: May I have the exhibits to have them identified.

Q. I show you Plaintiff's Pre-Trial Exhibit No. 1 and ask if those are the work sheets to which you have just referred? A. They are.

Q. I hand you Plaintiff's Pre-Trial Exhibit No. 2 and ask you to state whether or not this is a compilation of purchases you have referred to?

A. It is.

Q. And I hand you Plaintiff's Pre-Trial Exhibit No. 3 and ask you if you made this compilation, and I ask you to state what it is.

A. Yes, sir. This is a price schedule applicable to the sales, [17] Table E Schedule.

Miss Gallagher: Your Honor, we offer as separate exhibits Plaintiff's Pre-Trial Exhibits 1, 2 and 3.

The Court: They are admitted.

(The summary of contents of defendant's sales invoices, etc., consisting of sheets marked 1 to 23, both inclusive, two sheets therein being numbered 2 and two sheets therein being numbered 3, having been previously marked Plaintiff's Pre-Trial Exhibit 1, was further marked "and trial"; the compilation of Purchases,

(Testimony of Theodore J. Holdt.)

consisting of three sheets, lettered "A", "B", and "C", so offered and received, having previously been marked Plaintiff's Pre-Trial Exhibit 2, was further marked "and trial"; and the tabulation or compilation of price schedule applicable to the sales, headed "Table 'E' salmon prices", consisting of two sheets, so offered and received, having been previously marked Plaintiff's Pre-Trial Exhibit 3, was further marked "and trial".)

A

	Fro. Chinook	Fro. Salmon	Bx. Frt. Tax
9-			740 4 00
9-			16 02
10-			4 26
10-			4 26
10-			8 52
10-			12 54
10-			5 00
10-			14 76
10-			6 00
11-			4 00
11-			4 00
11-			6 00
9-			
9-			
9-			
8-			
8-			1.5† 14 99
11-20	301½		
11-			
11-			
11-			
11-			
11-37	.305		
11-		220	26
11-			
11-			
11-12	.305		
12-			
12-69	.305		
12-68	.305		
12-09	.305		
12-98	18 .305		
	—		
12-07	192 .305		
	24		
12-75	— .305		
	4.32		
12-			
12-			
12-			
95*		220*	

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 2

PURCHASES

A

			S. Fresh Dr. Silvers	S. Fresh Falia. Dr.	Chinook	St. Hds. Dr.	"Salmon" Hds. Off	Fro. Chinook	Fro. Salmon	Ex. Frt. Tax
9-29	S.J.	08193	400 @ 21							740 4-00
9-30	S.J.	08363	400 @ 21	600 .1475						16 02
10- 2	"	08201	200 21							4 26
10- 9	"	08237	200 21							4 26
10-19	"	08291	400 21							8 52
			401							
10-21	"	08309	403 21	403 .1475						12 54
10-23	"	08320		500 .1475						5 00
10-27	"	08344	200 21	800 .1475						14 76
10-29	"	08352		400 .1475						6 00
11- 1	"	08383		400 .1475						4 00
11- 3	"	08387		400 .1475						4 00
11-15	"	08557		600 .1475						6 00
			2201*	4103*						
9-20	Portland Fish Co.	12364			1220 26					
					(Salmon)*					
9-22	" " "	12438			500 .26					
9-25	" " "	12581				450 20				
8- 6	" " "	10554					403 32			
8-23	" " "	11249		Desig. "Lge Salmon"*	999 .295					1.5† 14 99
11-16	" " "	0356		600 18				220 30½		
11-17	" " "	0393		600 18						
11-18	" " "	0474		600 18						
11-19	" " "	0503		600 18						
11-19	" " "	0525		600 18						
11-23	" " "	0720						37 .305		
11-24	" " "	0743		400 .165					220 26	
11-26	" " "	0774								
11-26	" " "	0762		400 .165						
11-30	" " "	0948						612 .305		
12- 2	" " "	1035		200 18				69 .305		
12- 2	" " "	1028						68 .305		
12- 3	" " "	1083						609 .305		
12- 7	" " "	1241						98 18 .305		
12-10	" " "	1366						—		
12-10	" " "	1381						107 192 .305		
								24		
12-14	" " "	1534						475 — .305		
						Fro. C.R.*		4.32		
12-28	" " "	2017				307 .195				
12-29	" " "	2058				400 .195				
12- 3	" " "	2105				100 .26				
			4000*		2719*	1257*	403*	2295*	220*	

* Pencilled in red.

† Circled in red.

(Testimony of Theodore J. Holdt.)

Plaintiff's Pre-Trial and Trial Exhibit No. 2—(Continued)

PURCHASES											B	
			Dr. Silvers	Rd Chinoos	Greyling	Dr. Chinoos	Hds. off Dr Chin.	Rd. Silvers	Fall Brites	Dr. Steel H.	Chums	Box, Tax, Frt.
8-12	J. E. Lawrence	202068	400 21									5 40
9-18		203625	205	205 19								2 06
9-22		203753			54 10							
9-22		203752				181 .2275	708 .2475					2 63
9-23		203780					708 .2475					10 27
9-24		203845					183 .2475					2 66
9-25		203916			Not desig. Hds. off.*		546 .2475					7 92
9-27		203997			" "		739 .2475					10 71
9-27		203999			" "		314 .2475					4 58
9-29		204066			32 ‡ 10							
9-30		204132			Not desig. Hds. off.*	1109 .2475						16 08
10- 4		204313			Hds. off*	569 .2475						8 25
10- 5		204378	141 17			1188 .2475						20 33
10- 7		204517	551 17		Not Hds. off.*	176 .2475						14 67
10- 7		204518			" "	147 .2475						2 13
10- 8		204557			" "	150 .2475						2 06
10- 8		204597			" "	159 .2825	<					2 30
10-11		204710			" "	918 .2475						13 32
10-14		204893			" "	368 .2475						5 34
10-16		205007			" "	912 .2475						13 22
10-18		205059			" "	360 .2475						5 22
10-19		205106	183 17		" "	181 .2475						5 28
10-20		205146			" "	551 .2475						7 99
10-23		205518			" "	200 .2475						3 50
10-23		205521						671 .135				16 77
10-25		205550				131 .2475			26 .12			
10-25		205540	148 17			131 .2475						3 06
11- 8		206144	62 17	—Not desig. Dr.*—	134 .2275							3 31
11- 9		206245	185									3 72
11-10		206202	66 17		Not desig. Dr. or Hds. off.*:	95 .2475			165 .1825			6 13
11-12		206351	71 17		Not Hds. off.*:	107 .2475			18 .1825			3 13
11-13		206396	102 17		" "	46 .2475						3 05
11-14		206462	150 17		" "	17 .2575	<		Not dr.*:	6 .1825		18 55
11-15		206472	121 17		" "	23 .2475				8 .1825	920 .105	11 71
11-16	None desig dr *	206532	107 17							10 .1825	366 dr.*.105	9 13
11-20	all dr *	205254	41 18							26 .1825	546 .105	2 46
11-26		206768	147 17		Not Hds. off.*:	25 .2475				21 .1825	67 .105	6 07
11-27	Not des dr *	206797	150 17							92 .1925		4 59
11-27	" "	206791	79 17								33 .105	3 78
11-29									92 .1825			
		S† 2704	205*	86*	315*	9922*	S† 671*	26*	438* S†		320 Fro.*10	
											2252* S†	

* Pencilled in red.

† Circled in red.

‡ Pencilled in red: #2.



(Testimony of Theodore J. Holdt.)

Plaintiff's Pre-Trial and Trial Exhibit No. 2--(Continued)

PURCHASES												C		
			Chinook	Silvers.		Steel Hds.		Chums		Fr. Chums.	Br. Falls	Pro. Br. Falls	Pro. Dr. Silvers	Ex-Prt-Tax
11-29	J. E. Lawrence Co.	206841	227	.2475	46	17	63	.1825	2252*					7 39
11-29	dr.*	206844			138	17	49	.1825						4 15
12- 1		206991							408	.115				7 79
12- 2		207016									88	10		
12- 2		207015			71	.1775								7 61
12- 3		207048							55 Tr.*	10				
12- 3		207046			8	17			471	.105				7 75
12- 4	Dr.*	207077							93	10				
12- 4		207075			63	17	32	.1825			104	.105		3 78
12- 7		207179									242	10		
12- 7		207174	42	.2475	193	17	72	.1825						6 75
12- 8 }							83	.1825						
					37	17	164	.1825						6 55
12- 8		207217			37	17	247	.1825						6 75
12- 9		207272								227	10			
12- 9		207270	24	.2475	49	17	183 dr.*	.185	85	.105				7 01
12- 9		207334	54 Rd.*	24										
12-10		207442										1355	.215	
12-11		207477											1700	.2125
12-14	all dr.*	207478			35	.1775	15	.1825	51	.105				2 30
12-15		207577								89	10		not dr.*	
12-21		207788											253	.2125
12-21		207738										995	.215	
			10269*		3231*		1346*		3415*	750*	314*	2350*	1953*	

* Pencilled in red.

Internat'l Fishing Co.		Box	Spring Sal.	Can. Money	U.S. Money				Hds. off			"Salmon" Hd. off	Pro. Salmon	Rd. Chinook
9-29	Hds. on*	5.00	790 .205	16695	15176		Dr. Silvers		Dr. Chinook		Chinook			
9-29	Hds. on*	3.75	607 .225	14032	12756	J.E.L. S.J.	2201 21							
9-22		6.00	842 .205	19545	17767	J.E.L.	3231 17	315 .2275	10269 .2475					205 19
9-24	Hds. on*	1.25	300 .205	6150	135.75 Can.	Port. Fish					2719 26	2295 .305	403 .32	220 .26
	Hds. off*		300 235	7050	12340		5432	315	10269		2719	2295	403	220
9- 8		3.75	638 225		14730		S Fresh Falls Dr.	Dr. Steel Hds.	Rd. Silvers		Fall Brite	Chums.	Greyling	Frozen Fall Brite
			3477	63472		S.J. Co.	4103 .1475				314 .105			
						P.F. Co.	4000 .18	1257 .195			26 .12	3415 .105	86 .10	2350 .215
	* Pencilled in red.					J.E.L.		1346 .1825	671 .135		340	3415	86	2350
							8103	2603	671					1953

* Pencilled in red.

* Circled in red.

Total purchase as indicated by purchase invoice:

S.J. J.E.L. & P.F.	41,379
International Fishing Co.	3,477
Purchases from Indians at Celib.	23,243#
Purchases from Wholesale dealers	44,856#

Total Purchases..... 68,099#

(Testimony of Theodore J. Holdt.)

PLAINTIFF'S PRE-TRIAL AND TRIAL EXHIBIT No. 3

TABLE "E" SALMON PRICES

Item No.	Schedule	Troll or Seine	Variety	Style of Dressing	Size	1948—Price in cents per pound					Original Regulation
						Aug.	Sept.	Oct.	Nov.	Dec.	
1	27—Red Meated	Troll	Chinook	Drawn	14# and over	30 $\frac{1}{2}$	30 $\frac{1}{2}$	30 $\frac{1}{2}$	30 $\frac{1}{2}$	30 $\frac{1}{2}$	Amendment No. 7
	27—Red Meated	Troll	Chinook	Drawn	Under 14#	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	
	27—Red Meated	Troll	Chinook	Dressed	12 $\frac{3}{4}$ and Over	33	33	33	33	33	
	27—Red Meated	Troll	Chinook	Dressed	Under 12 $\frac{3}{4}$ #	28 $\frac{3}{4}$	28 $\frac{3}{4}$	28 $\frac{3}{4}$	28 $\frac{3}{4}$	28 $\frac{3}{4}$	
	27—Red Meated	Troll	Chinook	Round	16# and Over	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	26 $\frac{1}{4}$	
	27—Red Meated	Troll	Chinook	Round	Under 16#	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	
2	33	Seine Col. River	Chinook	Round	All Sizes	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	22 $\frac{1}{2}$	
	33	Seine	Chinook	Dressed	All Sizes	28 $\frac{1}{4}$	28 $\frac{1}{4}$	28 $\frac{1}{4}$	28 $\frac{1}{4}$	28 $\frac{1}{4}$	
3	28	Troll	Silvers	Drawn	All Sizes	24	24	24	24	24	
	28	Troll	Silvers	Dressed	All Sizes	26 $\frac{1}{2}$	26 $\frac{1}{2}$	26 $\frac{1}{2}$	26 $\frac{1}{2}$	26 $\frac{1}{2}$	
4	29	Seine	Silvers	Round	All Sizes	16	20	20	20	20	Amendment No. 7 Puget Sound
	29	Seine	Silvers	Dressed	All Sizes	19 $\frac{3}{4}$	24 $\frac{1}{2}$	24 $\frac{1}{2}$	24 $\frac{1}{2}$	24 $\frac{1}{2}$	
	30	Seine	Salmon, Fall	Round	All Sizes	16	16	16	16	16	
5	30	Seine	Salmon, Fall	Drawn	All Sizes	17 $\frac{3}{4}$	17 $\frac{3}{4}$	17 $\frac{3}{4}$	17 $\frac{3}{4}$	17 $\frac{3}{4}$	
	30	Seine	Salmon, Fall	Dressed	All Sizes	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	
6	35	Seine	Steelhead	Round	All Sizes	18	18	18	18	18	Amendment No. 7
	35	Seine	Steelhead	Dressed	All Sizes	21 $\frac{3}{4}$	21 $\frac{3}{4}$	21 $\frac{3}{4}$	21 $\frac{3}{4}$	21 $\frac{3}{4}$	
7	28	Troll	Silvers	Round	All Sizes	21	21	21	21	21	Amendment
	29A	Seine Col. River	Silvers	Round	All Sizes	17 $\frac{1}{2}$	17 $\frac{1}{2}$	17 $\frac{1}{2}$	17 $\frac{1}{2}$	17 $\frac{1}{2}$	
8	29A	Seine Col. Riv.	Silvers	Drawn	All Sizes	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	19 $\frac{3}{4}$	No. 7
	29A	Seine Col. Riv.	Silvers	Dressed	All Sizes	21 $\frac{1}{4}$	21 $\frac{1}{4}$	21 $\frac{1}{4}$	21 $\frac{1}{4}$	21 $\frac{1}{4}$	
9	29B	Seine Ore. Streams	Silvers	Round	All Sizes	17	17	17	17	17	Amendment
	29B	Seine	Silvers	Drawn	All Sizes	19 $\frac{1}{4}$	19 $\frac{1}{4}$	19 $\frac{1}{4}$	19 $\frac{1}{4}$	19 $\frac{1}{4}$	
	29B	Seine	Silvers	Dressed	All Sizes	20 $\frac{1}{2}$	20 $\frac{1}{2}$	20 $\frac{1}{2}$	20 $\frac{1}{2}$	20 $\frac{1}{2}$	
10	30A & 30B	Seine	Salmon Fall Chums	Round	All Sizes		11 $\frac{1}{2}$	11 $\frac{1}{2}$	11 $\frac{1}{2}$	11 $\frac{1}{2}$	No. 15
	30A & 30B	Seine	Salmon Fall Chums	Drawn	All Sizes	12 $\frac{3}{4}$	12 $\frac{3}{4}$	12 $\frac{3}{4}$	12 $\frac{3}{4}$	12 $\frac{3}{4}$	
	30A & 30B	Seine	Salmon Fall Chums	Dressed	All Sizes		14	14	14	14	

(Testimony of Theodore J. Holdt.)

Miss Gallagher: I have, your Honor, before you a copy of the Pre-Trial Exhibits mentioned, and also Regulation 418, section 14 marked, which shows record-keeping requirements, section 7 marked, which shows the allowance for transportation, and also [18] Amendment No. 16, to which I referred in my opening statement. I have also handed a copy of each to Mr. Bassett.

Mr. Bassett: Thank you.

Miss Gallagher: If the witness will refer to all of the exhibits I should like to question him about them.

Q. Mr. Holdt, I direct your attention on Plaintiff's Exhibit No. 1 to column 5, which purports to show the maximum price which applies to each of the sales shown in column 3. Will you tell the Court the method which you used in selecting the maximum prices for these sales?

A. By reference to the price schedule I used the price that was indicated by the description on the sales invoice and the price that was on the sales invoice. The description was not sufficient in itself to identify the item but together with the price the item was placed in a bracket to which the schedule was applied.

Q. That method of computation was used for what period?

A. That method was used for the period from August to November 9th, and during that period the highest price permissible under the regulation in consideration of the description given on the

(Testimony of Theodore J. Holdt.)

invoice was used. That was to November 9th. From November 9th to December 31st, Amendment No. 16 applied, which stated that in the absence of sufficient description the lowest price shall be used for the variety or species, grade, style of dress, so that after November 9th if the invoice stated that the item was silvers, without any further description as to whether it was dressed or [19] drawn, or troll-caught, the lowest silver price was used; and the same with the other item, the Chinook. In some instances the item was merely described as salmon, without any identifying description. The price on the items mentioned as salmon varied from I think 15 to 35 cents. In such instance it was necessary to determine as nearly as possible from the price used on the invoice what particular kind of salmon it might be.

Q. Will you state whether or not in the making of your computations you have resolved questions in favor of the defendant?

A. Any case in which there was any doubt about it I have resolved the doubt in favor of the defendant.

Q. Now I direct your attention to the last line under column 5, which is marked overcharge, and ask you to state whether or not you personally calculated the overcharge entry for each of the sales?

A. I did.

Q. Have you worked those calculations over more than one time? A. Yes, I have.

(Testimony of Theodore J. Holdt.)

Q. Has anyone other than yourself checked the calculations?

A. Yes; Mr. Walker, an investigator from our office.

Q. Will you state whether or not since Exhibit 1 was first prepared and offered as our pre-trial exhibit you have studied the case any further?

A. Yes, I have.

Q. Will you state whether you have found it is proper to make any [20] changes in the results as shown on Exhibit 1?

A. Yes.

Q. Will you state what those changes are and why it was proper that they be made?

A. The first change was in the period from November 3 to November 9 in the original computation.

Q. On what page will we find the calculations?

A. The computations, the dates of November 3 and 9 are on pages 23—18, 20, 23; also on page 19. On sheet number 18, item 3, I omitted the amount of that overcharge altogether. That was in the amount of \$59.21. On sheet number 20, item number 27 was omitted entirely. That was \$3.75. On sheet number 23 the items are marked total 266 pounds. The price of 33 cents was used instead of the price originally used, which made a difference of \$27.93.

Q. Why did you make that change in your calculations?

A. In the original calculation I used November 3 as the date of the amendment, whereas I should have used November 9 as the date of the amend-

(Testimony of Theodore J. Holdt.)

ment requiring that the lowest price shall be used if the item is not properly identified.

Q. Did you make any further changes in the calculations after the exhibit was made up?

A. Page number 1 of the exhibit, on the original calculation I used the highest price in the round. On revision of the calculations I used the highest price of the item, which would be the dressed [21] price, which made a difference on that sheet, that is sheet number 1, of \$105.99. The total overcharges on that sheet were \$23.27 instead of \$129.26.

Q. Have you made a total calculation of your changes? A. Yes, I have.

Q. Well, will you state whether or not you have used the new figures in the final alleged overcharges.

A. I have used the new figures in the final overcharges.

Q. Now are there any further changes which should be made in the exhibit as it now stands?

A. On the original—on the invoices there was no tax, state privilege tax or box charge, or freight charge indicated. However, we computed the total of those charges as paid when the items, when the merchandise was purchased, and deducted that total from the total amount of the overcharges, so that even though the state privilege tax and the box charges and the freight charges which may be added if separately indicated, even though they were not indicated I deducted them from the total amount of the overcharegs.

(Testimony of Theodore J. Holdt.)

Q. Can you state what is the total alleged amount of the overcharge?

A. It is two thousands——(witness pauses.)

Q. Well, Mr. Holdt, to save your time in calculating, I will ask you directly if my statement to the Court that \$2047.49 is the proper allegation of overcharges. [22]

A. According to my recollection, I think that is correct. I don't find the figure here.

Miss Gallagher: All right. You may cross examine, Mr. Bassett.

Cross Examination

By Mr. Bassett:

Q. What is your occupation or trade, Mr. Holdt?

A. I am an investigator for the Office of Price Administration.

Q. What are your qualifications for that? What is your education?

A. Well, I have four years of college education and I have had some, about thirteen years of business experience and some police experience.

Q. What was the business experience, Mr. Holdt?

A. I was in the wholesale and retail grocery business.

Q. Where?

A. Cincinnati, Ohio.

Q. What were your duties?

A. I was branch manager. The company had

(Testimony of Theodore J. Holdt.)

five branches and I was manager of one of the branches.

Q. What is your police experience?

A. I was with the United States Department of the Interior.

Q. When was that?

A. Since 1941 to March of 1944.

Q. Where was that? Where?

A. That was in Vancouver.

Q. Please? [23]

A. I was stationed at Vancouver.

Q. Washington?

A. Vancouver, Washington.

Q. What has been your experience in bookkeeping and accounting, Mr. Holdt?

A. Shortly after leaving high school I worked as an accountant—bookkeeper for one year with the R. Wallace & Sons Company, silversmith, in Chicago, and I took a course, which was not completed, at the University of Cincinnati, in bookkeeping.

Q. Were you ever engaged as an accountant or a bookkeeper?

A. No, I was not, with the exception of the period I mentioned before, shortly after leaving high school.

Q. You studied it? A. Yes.

Q. You never hired out as a bookkeeper?

A. With the exception of the period that I mentioned, my duties were not entirely bookkeeping. I had other duties, clerical duties.

(Testimony of Theodore J. Holdt.)

Q. Mr. Holdt, have you ever had any experience in the fish business?

A. No, not fresh fish.

Q. The first experience you ever had in this business was last March of this year?

A. That is right.

Q. When you were hired by the OPA? [24]

A. That is right.

Q. Mr. Holdt, you prepared these exhibits from the invoices, did you not? A. I did.

Q. You still have Mr. Joe Jaha's invoices up to the OPA?

A. No. They have been returned to him.

Q. Please?

A. Those have been returned to you.

Q. You still had them?

A. Oh, yes; I had them at that time.

Q. They were brought up there about Christmas time and remained there for some month, didn't they, Mr. Holdt?

A. I don't know.

Q. Well, you know that you were down also at Mr. Jaha's place of business, do you not?

A. That is right.

Q. And you found him cooperative, did you not? A. Yes, I did.

Q. You would say he helped you all he could, didn't he?

A. I think he did, yes.

Q. Mr. Holdt, you referred in your testimony to salmon. What do you mean by salmon, Mr.

(Testimony of Theodore J. Holdt.)

Holdt? What do you understand the term "salmon" to mean?

A. Salmon includes all the various varieties. Salmon is a species and includes Chinook, silvers, blueback or sockeye, steelheads, [25] fall.

Q. Fall, you said? A. Fall—f-a-l-l.

Q. Do you mind my asking you, Mr. Holdt, where you learned that?

A. I learned it largely through conversation with and contact with the trade, and through information that could be gained from regulations, and information gained by others in the business.

Q. Yes.

A. Not exactly in the business but who had contact with the business.

Q. Don't you know, as a matter of fact, Mr. Holdt, that since the time of the Indians on the Pacific Coast, and in the Northwest and in Canada ever since the time of the Indians the word "salmon" as used by fishermen or in the trade applies exclusively to Chinook, the Royal Chinook?

A. No, I don't know that to be a fact.

Q. Well, do you know that you could telephone any fisherman in the Northwest and ask him to send you some salmon and he would only send you one thing? A. He would send Chinook?

Q. Yes. A. That is right.

Q. He wouldn't send you sockeye, or fall, any more than he would send you suckers, would he? He would know that you mean Royal Chinook Salmon; isn't that right? [26]

(Testimony of Theodore J. Holdt.)

A. Well, I think he might ask what kind of salmon.

Q. If he did, but if he didn't?

A. If he didn't he would send me Chinook.

Q. Mr. Holdt, weren't there more pages to this exhibit when it was first prepared?

A. Twenty-three pages.

Q. I know you didn't hide any but I mean, for the purpose of my examination, weren't there some pages that were intended to show Mr. Jaha's purchases?

A. That was in the original computation after consultation with you.

Q. Yes. And that is where you indicated in your opinion he had purchased one hundred seventy some thousand pounds?

A. That is right, one hundred seventy-five thousand, according to records of the Fish Commission.

Q. Now Mr. Holdt, you know, of course, that that figure represented his gross purchase?

A. I do.

Q. Did you take into consideration that he had some between thirty and forty thousand pounds unsold and in storage?

A. As a matter of fact, I didn't think it was necessary to take that into consideration, because these computations cover only 42,000 of that 175,000 pounds. It wasn't possible for me to account for the other 133,000 pounds. So that these computations cover only 42,000 pounds. [27]

(Testimony of Theodore J. Holdt.)

Q. But they are of that 175,000 pounds?

A. They are.

Q. Not different fish, are they?

A. They are included in the 175,000.

Q. That is right. In your computations, Mr. Holdt, you have in many instances credited the defendant with the price of a fish round; isn't that true?

A. That is true, after November 9th.

Q. Yes.

A. The effective date of the Amendment 16.

Q. That means, in other words, you are saying, Mr. Holdt, that Mr. Jaha can only take credit for a round fish and you have reduced his selling price to that point since November 9th; isn't that true?

A. The regulation requires that I use the calculation after November 9th.

Q. I understand that. I am not quarreling with you about it, Mr. Holdt; I am only asking you if that is the method you followed.

A. That is right.

Q. Now you know, as a matter of fact, Mr. Holdt, that there isn't a place in Portland that Mr. Jaha sells to, or any other dealer sells to, that buys round fish? You know that, don't you?

A. I do not know that as a matter of fact.

Q. Well, may I ask you, you should know it shouldn't you? There is no dealer in Portland, nor restaurant, that would buy the [28] round fish?

A. Some dealers and restaurants do buy round fish.

(Testimony of Theodore J. Holdt.)

Q. Do you know any, Mr. Holdt?

A. I know of one that has. I know of a particular instance that has.

Q. But you know as a custom, as a general custom, that 99.44 per cent of the restaurants of Portland would not buy a round fish and take it out in the kitchen and give it to the chef and say, "Take the hide, tail and viscera from the fish"?

A. Well, I don't know about that percentage. I know that it is not often done, but it is in some instances.

Q. You would say it is rare, wouldn't you?

A. Well, I am not familiar enough with the restaurant business to say, no.

Q. Well, that is what I am getting at, Mr. Holdt. You should have taken that into consideration, shouldn't you?

A. I could not have taken it into consideration and yet followed the provisions of the regulation.

Q. The regulation said if he does not say—if he does not describe the dressing on there give him credit for the lowest grade?

A. That is right.

Q. And that is a round fish?

A. That is right.

Q. With its head and tail and insides in it; isn't that right? [29]

A. That is right.

Q. Now when you were computing those last pages of the original exhibit as to poundage, did you take into consideration the difference in the

(Testimony of Theodore J. Holdt.)

gross and net poundage of fish between a dealer's buying and selling weight? You know the factors that affect that, don't you?

A. Yes; yes, I do.

Q. What would they be, Mr. Holdt?

A. They didn't enter into the consideration, inasmuch as these computations are based only on a small percentage of the total purchases.

Q. Well, you can make any qualifying remark, subject to the limitations of the Court, but I would like to have you answer my question, if you will, Mr. Holdt.

A. I am sorry. I misunderstood you.

Q. You add anything you want, but what considerations, what elements do you take into consideration? If you took any, what elements did you take into consideration in arriving at the poundage of fish Joe Jaha could have sold from the pounds he bought?

A. I——

Miss Gallagher: Well, your Honor, I object to that question as not being proper cross examination. I am not going into the question of how much the defendant could have sold from how much he bought. We are examining as to what his records show that he [30] did sell.

Mr. Bassett: I am cross examining him, your Honor, on a report prepared by this gentleman, on this exhibit as originally introduced in this trial. I am cross examining him on that exhibit to show what he knows about it.

(Testimony of Theodore J. Holdt.)

The Court: Is the exhibit you have different from mine? Mine has twenty-three pages.

Mr. Bassett: Yes. That is the question I asked at first, your Honor. I was under the impression that the first exhibit introduced in this trial, the one from which he is reading, has more pages.

The Court: How many does yours have?

Mr. Bassett: Twenty-three.

The Court: You thought it had more than twenty-three pages?

Mr. Bassett: That yellow one, your Honor, yes.

The Witness: This has twenty-three.

Miss Gallagher: Your Honor, I think I can clear it up in Mr. Bassett's mind. During the course of the conversations we have held in our office we have gone through yellow page after yellow page and we have had a good many which we did not introduce into evidence at the time of the pre-trial. Mr. Bassett, I think you are thinking of a large page paper, out of which we made numerous computations of total purchases and total sales, are you not?

Mr. Bassett: Yes; that I am. [31]

Miss Gallagher: We have made such computations but they have never been introduced in evidence in this trial.

Mr. Bassett: Oh. All right.

The Court: What do purchases have to do with this case? That is a dumb question probably. I don't understand this case very well so far.

(Testimony of Theodore J. Holdt.)

Miss Gallagher: That is why I object to the question by counsel. Except as counsel has opened it up on cross examination we have not gone into the total number of pounds purchased by the defendant. We have concerned ourselves with the total number of pounds he has sold, as shown by his own invoices, and have totaled the purchase invoices which he gave to us in order to get from that the box, freight, tax that he had paid. Other than that——

The Court: Just to get that tax?

Miss Gallagher: That is the only use we have made of his purchase records for the purposes of this case. We have examined them and have discussed them a good deal but we have not brought them into use here.

The Court: But you want to inquire——

Mr. Bassett: I must confess, your Honor, my question is a little pointless, now that I learn those two pages were not introduced.

The Court: Oh.

Mr. Bassett: May I explain my point, your Honor, further? The OPA came to this defendant and said, "You bought 175,000 pounds [32] of fish last year. Now where is a record of your sale of it?" Well, of course the poor fellow can't show that, because when he sold the fish there were probably——

The Court: Yes. You explained that in your opening.

Mr. Bassett: Yes. All right. That is all, Mr. Holdt. Thank you.

(Testimony of Theodore J. Holdt.)

Miss Gallagher: That is all from me, Mr. Holdt.

(Witness excused.)

Miss Gallagher: And, your Honor, that constitutes the plaintiff's case.

Mr. Bassett: May I state to your Honor that I have not raised the question, and don't propose to raise any question, about the jurisdiction of the Court. I had this matter—that question is before this Court, is it not, in another case, and would, of course, affect this case similarly?

The Court: I don't know what you mean.

Mr. Bassett: Is there not before this Court in the Wheeler case the question of the jurisdiction of the right of Chester Bowles to bring such an action in this court?

The Court: The Wheeler case has passed into another jurisdiction.

Mr. Bassett: I beg your pardon?

The Court: The Wheeler case has gone to another jurisdiction.

Mr. Bassett: Yes. I understand that, your Honor. Well, I [33] shall continue to waive it anyway. I will call Mr. Jaha. Will you take the stand, Mr. Jaha, after being sworn.

Defendant's Evidence

JOE JAHA

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bassett:

Q. Your name is Joe Jaha; is that right?

A. That is right.

Q. And you are the owner of the Lighthouse Oyster Company?

A. The owner, and——

Q. The principal stockholder; is that not right?

A. Yes. I am not a corporation no more.

Q. That is right. You are now a sole trader, aren't you? A. Sole owner.

Q. You are a sole trader. And what is the nature of your business, Mr. Jaha?

A. Oysters.

The Court: This defendant is sued as a corporation.

Mr. Bassett: Yes, your Honor. I believe I spoke to counsel about that and agreed to permit them to amend, or whatever else was necessary. I want to raise no point about our entity, or the form of our entity. We are now sole trader. I was not counsel [34] for this gentleman when he changed his form of doing business.

The Court: When did you change?

A. December—January 1st.

(Testimony of Joe Jaha.)

The Court: '44?

A. '44.

The Court: He was doing business as a corporation during the times involved in the case?

Mr. Bassett: Yes, your Honor, from August to December.

The Court: Yes.

Mr. Bassett: Q. And the nature of your business is what? A. Oysters. Oysters.

Q. And what? Oysters and what?

A. Oysters and fish.

Q. And fish? A. And sea food.

Q. And how long have you been in this business?

A. Since 1930.

Q. 1930. And all of that time in Portland, Oregon? A. Portland, Oregon.

Q. Are you a large or small dealer?

A. When it comes to fish, a very small dealer, what you call a secondary wholesaler.

Q. As to fish you are a secondary wholesaler?

A. Yes.

Q. Of what did your staff consist in the last five months of last [35] year, Mr. Jaha?

A. What do you mean?

Q. Who do you employ?

A. Well, I got two driver.

Q. You have two drivers?

A. But I got seven oyster openers.

Q. In the fish business, I mean.

A. Two drivers.

(Testimony of Joe Jaha.)

Q. Two drivers and yourself?

A. Myself, and a bookkeeper.

Q. You are the active manager of that business, are you not? A. That is right.

Q. And a bookkeeper?

A. Four days a week.

Q. Four days a week. How long have you had this bookkeeper?

A. It is a good year and a half now, I think; a little over a year and a half.

Q. Over a year. And before that who did you have? A. A man and his wife, Jones.

Q. And how long were they with you?

A. Oh, they was with me for over six or seven year.

Q. When you engaged this new bookkeeper did you undertake to teach her the OPA law and rules and regulations?

A. She doesn't—that is all she does, is to keep books. She wouldn't—— [36]

Q. So that responsibility devolves upon you, then? A. That is me.

Q. And how do you get your information, Mr. Jaha?

A. Well, we get it by calling either wholesalers and the dealer we buy from, and what we are supposed to sell the fish for after we buy it from them. Say we bought it for twenty and supposed to sell it for twenty-three, and that is what we sell it for. And we call the OPA; we don't get much informa-

(Testimony of Joe Jaha.)

tion from that, and I generally call J. Lawrence and Portland Fish and the other sellers here.

Q. What happens when you call the OPA?

A. Well, it is, the prices they give us they read the rule to us and the price they give us is not in the picture at all. Some of it we can't even get our money back.

Q. Mr. Jaha, do the OPA change these rules now and then? A. Very often.

Q. And sometimes do they change them to take effect back some time?

A. Well, they did that this last September.

Q. What did they do?

A. Why, they changed the rule on salmon, and six days back, I think, or four days back—six days back.

Q. During what period was that?

A. That was——

Q. Was it during the Celilo run? [37]

A. Celilo run; that is right.

Q. Did that cause some difficulty?

A. Well, they did with lots of them. Not with me. I wasn't buying then.

Q. Have you kept these records to the best of your ability, as you understood them?

A. Well, as I understood, supposed to do business just like I was doing, just maintain the price, ceiling price like I was doing before. That is the way I had understood, to do like I was doing business before, except to maintain the ceiling price.

(Testimony of Joe Jaha.)

Q. And did you keep these records to the best of your ability, as you understood the law?

A. As I understood, yes. I wouldn't get any more than I was supposed to get.

Q. Did you ever knowingly and willfully charge in excess of the ceiling price, as you understood it?

A. No. If I did I wouldn't be there, because I thought I was selling at the price what should be sold.

Q. And did you make out your invoices the same way as all the people who sold to you during that period?

A. Well, not all of them. Some of them have sold to me, like Portland Fish. They sell to me the same way like I make my invoice. They add everything on. For instance, if I paid them eighteen I supposed to get twenty-two for it, which would give me four cents. [38]

Q. Is there anybody in Portland now in the market that you know of that will buy a round fish?

A. No. The only time they buy a round fish would be from a fisherman, if a fisherman come in off the river, or some sports fisherman wants to give a fish to the fish market.

Q. If an individual came in, you mean, from the river?

A. They would not buy it from a wholesaler. They will buy it from a sports fisherman, which they are not allowed to do it but they will do it.

Q. There is no such thing as selling round fish then from a commercial house?

(Testimony of Joe Jaha.)

A. No. We all sell dressed fish.

Q. In your business—you say you are a small dealer—do you ever sell these fish in portions?

A. Sir?

Q. Do you sell these fish in portions, part of a fish to one purchaser?

A. Well, during the wartime now the average, they can stand one fish, and some may want more, but before this the customers we sell to we have to cut a fish any time we go over fifteen pound.

Miss Gallagher: I didn't understand the answer to that question.

Mr. Bassett: I didn't hear it. Will you kindly read it.

The Witness: I said now they can stand a fish that comes to fifteen pounds, but before, some of them, if they come over [39] fifteen pounds they want cut; they want half, and lots of them want seven or eight pounds. If you haven't got it you have to cut half, one take the tail end and the other take the back end, or the head. Or we sell to small butchers. We don't sell any fish market, you might say, like——

Mr. Bassett: That is all, Mr. Jaha. Thank you.

Cross Examination

By Miss Gallagher:

Q. Mr. Jaha, have you ever had a copy of the regulation which concerns your business of fish, as a fish wholesaler?

A. You mean a book?

Q. Yes; the regulation?

(Testimony of Joe Jaha.)

A. Yes, we have book.

Q. Do you know when you first got that book?
When did you first have it?

A. I think when they first come out.

Q. When they first came out?

A. Maybe a month later, I guess. It couldn't be over a month later, I guess.

Q. When was the first time you came to the OPA office to get some help or information?

A. Well, I didn't go up. We called.

Q. When was the first time you called up there?
I mean you, Mr. Jaha, in your business.

A. Oh, I think Mr. Elias at that time was working for me. I had [40] him call for me. I think he called in July. I don't know.

Q. In July. When you came to see me you didn't know much about the regulation at that time, did you?

A. To tell you the truth, I don't know much now.

Q. You say that some of your suppliers had their invoices made out differently from the way that you were making them out?

A. Yes. Some did. J. Lawrence was the only one.

Q. You also have said that sometimes when you called the OPA for price that the prices they gave you were not good because——

A. Well, they would read it for me like if I was reading a book, but that doesn't mean anything.

(Testimony of Joe Jaha.)

Now they give us a good example, the one they give us now. That is about three months ago.

Q. When you called for a price, Mr. Jaha, for Chinook salmon, a dressed Chinook salmon weighing fifteen pounds, was there any misunderstanding as to how many cents a pound you could sell that for?

A. The way Mr. McCargar gave us a price it doesn't go for the Portland Fish even, as they explained it to him that he was wrong, he should get more money for it.

Q. You say the price was wrong?

A. That is right.

Q. It is wrong why, Mr. Jaha?

A. On the frozen fish I don't know why, but Portland did tell Mr. McCargar he was wrong.

Q. We are talking about fresh fish, not frozen fish now. Is it wrong, what it says in the book, in the regulation, or is it just wrong the way you were told?

A. It is wrong the way we got it from him, the way he told us the price.

Q. I understood you to say that some of the prices that were given you were wrong because you could not get the money back out of it?

A. No. Some of it we couldn't.

Q. Some of it you could not get your money back on. How many employees do you have at your place down there altogether, not only on salmon but on your oysters? How large an establishment do you maintain?

(Testimony of Joe Jaha.)

A. Oh, we have got seven oyster openers, and I have got two in the back in the shipping room to take care of orders, loading trucks and so on, and one grader and one helper; that is four; and two drivers. That is thirteen.

Q. Thirteen altogether in your whole place of business down here on First Street in Portland?

A. That is right.

Miss Gallagher: Oh, I think that is all of my questions.

Redirect Examination

By Mr. Bassett:

Q. Just one question, Mr. Jaha. This exhibit shows you selling under the price as well as over the price? A. I have sold under.

Q. Was that because you didn't know what the price was?

A. That is right. They changed. The price changed. I didn't [42] catch up with it.

Mr. Bassett: That is all. Thank you, Mr. Jaha.
(Witness excused.)

Mr. Bassett: Call Mr. Hughes.

TOMMY HUGHES

was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your name, please.

(Testimony of Tommy Hughes.)

The Witness: Tommy Hughes.

Mr. Bassett: May it please the Court, I have called this gentleman, who is, I think, as well informed in this field as probably anyone in Portland, for the purpose of identifying and offering, with the permission of the Court and consent of counsel, a chart showing the method by which fish merchants try to abide by the OPA, and with the understanding that I might withdraw it. It is a working chart they use every day in their business. I would like to indicate to the Court the difficulties of merchants in complying with the OPA rules and regulations.

The Court: Go ahead.

Mr. Bassett: Q. Mr. Hughes, will you please state to the Court what that is.

A. Well, this is a list that we have made up in our business for the purpose of our keeping track—in order to keep track of [43] the prices of the different species of fish.

Q. Do you discuss that with any members of the OPA? A. This.

Q. Yes. A. No.

Q. I suppose they have seen it when they have been in your office? A. I imagine they have.

Q. And does that, Mr. Hughes, reflect what you people have to do to conform with the OPA rules?

A. Yes.

Q. And there are several pages there, are there?

A. Yes.

(Testimony of Tommy Hughes.)

Mr. Bassett: Mr. Bailiff, will you please hand that to the Court.

The Court: Let Miss Gallagher see it first.

Mr. Bassett: Yes. I intended to do that.

The Court: What firm is Mr. Hughes with?

Mr. Bassett: Mr. Hughes is with the J. E. Lawrence Company. They are one of the oldest brokers in Portland. I am going to rest on that, your Honor.

The Court: Oh, I see.

Mr. Bassett: That is our defense.

The Court: Oh, I see. Well, as the matter stands now, this does not mean a thing to me. What does this purport to be? I will come down there.

A. This is a chart that we made up of the different species and prices, to try to keep track of them a little easier, and this represents the number, the OPA number. This column is the species of fish. These are the different tables of prices.

The Court: That you can charge, or that you can pay? A. That we can pay and charge.

The Court: Cross examine, Miss Gallagher.

Miss Gallagher: No cross examination, Mr. Hughes.

Mr. Bassett: That is all, Mr. Hughes.

(Witness excused.)

Mr. Bassett: That is our case, your Honor.

The Court: Are you through?

Mr. Bassett: Yes. We rest, your Honor.

The Court: Any rebuttal?

Miss Gallagher: No rebuttal.

The Court: I need to ask some questions. I am awaiting a telephone call on an urgent personal matter which may require my leaving. If that were so I could ask what I need to ask now. I will begin with the possibility I may have to leave and see you again. I regret that for your sakes, if that occurs. Now Mr. Bassett, you really don't make any defense, do you? You just put the Government on proof?

Mr. Bassett: Yes, I do, your Honor. I am sorry to say I do, except as to willfulness and knowingly. [45]

The Court: Yes. Well, where does that leave me?

Mr. Bassett: I take it, your Honor, that the Government has alleged we have done these things willfully and knowingly.

The Court: Well, aside from "willfully," where does that leave you as to the two thousand dollars?

Mr. Bassett: Well, it leaves us as——

The Court: Where does it leave me? Not, "Where does it leave you?" Where does it leave me?

Mr. Bassett: To go over the history, your Honor, we start out here and in each state in this game it is always different. It is still uncertain, your Honor. It still is where the Government has not proved—has not fulfilled their obligation by a preponderance of the evidence to show this man guilty of overcharging knowingly and willfully.

The Court: Well, forgot the willfullness for a minute. Aside from willfullness he is subject to a judgment for overcharge, for the amount of the overcharge, aside from the willfullness.

Mr. Bassett: Well, he is subject to a charge for undercharge, too. He is subject to a penalty for undercharging, too, your Honor.

The Court: Well, forget that. These are all overcharges, aren't they, in the Government's exhibits?

Mr. Bassett: They are claimed as overcharges, yes.

The Court: And they total two thousand dollars?

Mr. Bassett: Well, they do today. This is the first time [46] they have, your Honor.

The Court: Yes, they total \$2000.00. So in the absence of some defense he is subject to judgment for at least \$2000.

Mr. Bassett: I am afraid he is.

The Court: Yes. Send me up a typical invoice that didn't have things on it. Your case, Miss Gallagher, is all based on the idea he didn't put sufficient information on his invoices, isn't it?

Miss Gallagher: Well, we are not charging him—the only way we could reach the lack of invoice keeping would be by an injunction, or something like that.

The Court: No, no. In any of these items did he straight out plainly overcharge, as shown by the face of his invoice?

Miss Gallagher: You can't tell, your Honor.

The Court: All right. Now that was my question a minute ago.

Miss Gallagher: Yes.

The Court: Your case is built up the way the accountants do sometimes. The information being inadequate, you have had to supply it by an arbitrary method, haven't you?

Miss Gallagher: That is right.

The Court: And as to following November 9th you were specifically authorized by the amended regulation to supply it in a certain way?

Miss Gallagher: That is right.

The Court: Now what method did you use before November 9th?

Miss Gallagher: Before November 9th, this invoice here says [47] salmon, silver S-i-l.

The Court: Yes.

Miss Gallagher: Twenty pounds.

The Court: What was inadequate about that?

Miss Gallagher: It didn't show whether it was dressed, round or drawn.

The Court: All right. What did you do then before November 9th?

Miss Gallagher: All right. It didn't also show it was troll-caught or seine-caught.

The Court: What did you do before November 9th?

Miss Gallagher: Before November 9th we looked at the silver salmon schedule, which is before you perhaps there, and gave him the highest price of silver salmon that is allowed on the schedule, going up to the dressed charge.

The Court: Then he charged more than that?

Miss Gallagher: Yes, your Honor.

The Court: Then he did overcharge, giving him the benefit of every doubt?

Miss Gallagher: Giving him—yes, your Honor.

The Court: How?

Miss Gallagher: Yes, your Honor, giving him the benefit of——

The Court: What about that, Mr. Bassett?

Mr. Bassett: We claim not, your Honor. We claim there is not one invoice in there—— [48]

The Court: Take that one right there.

Mr. Bassett: That is right, where they would say, for example, silvers 20, 35 cents a pound. Where that will differ is where they came from, one item, boxed and——

The Court: She says she gave you credit on that invoice for the highest price that you could charge for silvers on that day, the highest price you could charge, and that you charged more than that, according to that invoice.

Mr. Bassett: No, there is not an invoice of all these thousands where we did that, your Honor, and they can't show it.

Miss Gallagher: Oh, my!

Mr. Bassett: That is why I have said here——

The Court: Wait now. We have got something——

Mr. Bassett: Pardon me?

The Court: We have got something to fight about anyhow. Miss Gallagher says you are all wet; you heard her say that under her breath; that as to many items there they are giving you the

benefit of the highest price on that date on the item you have described, and you charged more than you could charge.

Mr. Bassett: Yet me confer with my expert.

The Court: I don't know whether she will want to stand right by that invoice. She was just using that as a typical one there.

Mr. Bassett: Yes.

The Court: I want you to take one where you can claim that for it, Miss Gallagher, that it describes it fully and specifically, [49] does not say just salmon but says silver, as that one did. Now then, wherever he charged more on that invoice than he was entitled to charge on that date for silvers of the highest grade——

Mr. Bassett: I note here, your Honor, on this one—we won't hold her to this one, either, but they didn't charge 35 cents. They charged 30 cents. They didn't mean 35 because the total price is \$6.00 on twenty pounds, which is twenty times 30 cents.

The Court: Well, let's get back now to the fundamental regulation prior to Novemembr 9th. I understood Miss Gallagher to say a minute ago, which seemed to clear the situation considerably, if she wants to stand by that and is able to support that position, that prior to November 9th, when they didn't have the benefit of this amended regulation, she gave your client the benefit of the doubt in every case, so that in every case it was a straight-out overcharge prior to November 9th, having given him the benefit of every doubt. That seems plain enough.

Mr. Bassett: Well, your Honor, I believe this to be a fact: That the major portion of this claimed overcharge is for salmon. That can vary, dressed and troll-caught, from 22 cents a pound to 36 cents, and that is where they came along and said, "You haven't indicated",—which the driver didn't lots of times, and when he came back if you would fire him the next fellow would go out and do the same thing.

The Court: She just said where you say salmon she gave you the benefit of the highest price every day. [50]

Mr. Bassett: That is not in keeping with what the exhibit shows. Many times they have been reduced from 36 to 22, and that is a lot——

The Court: Well, let's get into it.

Miss Gallagher: May I ask a question?

Mr. Bassett: The margin of fish, your Honor, is 2 cents or 3 cents.

The Court: Well, I don't want to get anything in my head except what I am talking about.

Miss Gallagher: Let me take invoice No. 38408 here. It is dated August 20th, and reads Salmon, in print, Chin., in writing; 17 pounds 35 cents. That may not be there.

Mr. Bassett: It is not on the exhibit.

Miss Gallagher: : It may not be.

Mr. Bassett: 38408?

Miss Gallagher: That is right.

Mr. Bassett: It is the sixteenth item.

Miss Gallagher: The sixteenth item, what page, 2?

Mr. Bassett: Yes.

Miss Gallagher: The selling price listed on the exhibit and listed on the invoice itself is 35 cents per pound for Chinook. Ceiling price as computed by us in column 5 is 33 cents. The ceiling price for August on Chinook, troll-caught, dressed, 12 $\frac{3}{4}$ pounds and over is 33 cents. That is the highest Chinook price during August among the dressed, round and drawn fish. [51]

The Court: Your claim is that that is what you did in every case prior to the amendment of the regulation?

Miss Gallagher: Yes, your Honor. And when we have given him that higher price he has gone over that higher price.

The Court: How are you going to get away from that, Mr. Bassett?

Mr. Bassett: By claiming, and I think rightfully, that it does not include insurance, ice and boxing, which comes to a cent and a half or more and gives us the right to charge 35.

Miss Gallagher: Insurance, ice and box?

Mr. Bassett: Yes, and box. Isn't that right, Joe?

Mr. Jaha: Freight and box.

Mr. Bassett: Freight and box.

The Court: You will have to state that again.

Mr. Bassett: You are entitled to charge, in addition to the selling price the freight and box that we don't get; we pay it; a cent and a half or two cents. We are entitled to add that to the selling

price of the fish; otherwise we would be selling fish for nothing. That makes up the 2 cents difference. That is just what he is doing here, your Honor.

Miss Gallagher: You will recall, though, your Honor, that from his purchase records he testified that we added up all the freight that he is shown to have paid, and all the box charges he is shown to have paid; all the state privilege tax he is shown to have paid; made the total of that and deducted it from the [52] total of the overcharges as we computed them here. So that he has been given credit for all the box, freight and taxes that he has paid.

Mr. Bassett: Well, if your Honor pleases, I of course would be less than honest to come here and say that these books are not deficient in some respects; they are that; but the two things the OPA knows—whether we can show it or not—is that we didn't sell round fish in Portland, and we didn't get any fish without freight and boxes, and that we did. Whether we are able to show it they know it. We don't get them in the Willamette River, your Honor. Our records may be subject to criticism, and I will join in the criticism, but that is the fact. We know that.

The Court: The round fish question does not come into it until after the amendment of November 9th?

Mr. Bassett: No. But that is two months of the five.

The Court: Well, lay that aside for the moment.

Mr. Bassett: All right. But during all of that

period, your Honor, we certainly all that period got our fish in Astoria, Puget Sound, California——

The Court: Now let's take the invoice that you have. Where and how did you give him credit for the freight and boxing, Miss Gallagher?

Miss Gallagher: There is no notation, I think I can fairly say, on any of the invoices, of an additional box or freight charge shown, so we took Exhibit No. 2, which is the compilation [53] of all his purchases, all the purchase records he turned over to us, and added up his box charges, his freight charges and his tax charges and deducted that total from the total alleged overcharges. You see, he has made no showing on any of his sales invoices.

The Court: But you deducted that from the total?

Miss Gallagher: Yes, your Honor. There is no showing on any of the invoices that he has charged anything for box, freight and tax.

The Court: Yes.

Miss Gallagher: And he is required to show it, and to show it separately.

The Court: Yes. All right. What she is saying then is—what was it you gave there a minute ago he charged on that date, 35 cents?

Miss Gallagher: 35 cents.

The Court: And the price of troll-caught was 33?

Miss Gallagher: Troll-caught dressed Chinook was 33, which is the dressed charge.

The Court: All right. He charged 2 cents more per pound on that item that day, charged 2 cents a pound more, less his freight and boxing.

Miss Gallagher: That is right. Less.

The Court: And you gave him that credit in gross?

Miss Gallagher: That is right, your Honor.

The Court: In your calculation? [54]

Mr. Bassett: Your Honor, she is talking now, if I may say that. We are entitled to 35 cents, I don't care whether she added it some place or subtracted it in another place, it doesn't make any difference what her bookkeeping is, on that date we are entitled to 35 cents for that fish, your Honor. That is a known quantity.

The Court: How do you know you were?

Mr. Bassett: Because by her own statement that 33 was the selling price, the ceiling, to which we can always add our freight and box.

The Court: Is that correct, under the OPA?

Miss Gallagher: That he may add his box and freight?

The Court: To his ceiling price?

Miss Gallagher: To his ceiling price.

The Court: Which was 33 that date. You state you charged 35?

Mr. Bassett: Yes.

The Court: Which you said included freight and boxing?

Mr. Bassett: Yes, your Honor.

The Court: She says then she gave that credit.

Mr. Bassett: She is being gratuitous now. How can she give me anything? I am entitled to 35 cents, your Honor.

Miss Gallagher: You have got your credit for that.

The Court: What were your totals. Let's see just the way you did it. What was the total overcharge before you gave him the [55] credit? You are being sued for \$2000.00.

Mr. Bassett: I want to break into her trend of thought here, your Honor, to say I thought this man was being tried that way, item by item; or we can show, just as we are now, item by item, that you can't arrive at any \$2000.00.

The Court: Now Miss Gallagher, what was the total overcharge before you gave him the credit for the freight and boxing?

Miss Gallagher: Total overcharges, August through December, \$2560.83.

The Court: \$2560.83. That is what this column, the last column in the exhibits, totals?

Miss Gallagher: After the corrections which were made and testified to.

The Court: Yes, by your accountant?

Miss Gallagher: Deduction for freight, box and tax, and such charges, appeared on the defendant's purchase invoices, \$430.03.

The Court: \$430.03, leaving the amount you are suing for?

Miss Gallagher: Net overcharges twenty thirty, then there is further deduction for another correction, which wasn't——

The Court: Well, don't complicate this any further. She says she gave you the 2 cents there.

Mr. Bassett: Well, your Honor, may I answer

it this way? This \$2000.00 is the product of a thousand items, all of which are similar to the one we just got over. How can you get to any figure, your Honor, unless they show how they arrived at it. [56] They have arrived at it by saying vaguely she gave me 2 cents someplace else. There is where I desire it, your Honor, right there on that invoice. That is where I deserve it. Then their total overcharges must be taken from the sum total of these invoices. They are all the same way. Why be indirect about what can be brought out? How much are we entitled to add on these things? Well, we are entitled to the OPA ceiling price, plus whatever we spend.

The Court: What is that particular item you are talking about you just read, Miss Gallagher? You were looking at an exhibit that you had in evidence.

Miss Gallagher: It was 38408. It reads August 20th, 35 pounds of Chinook, 17 pounds of Chinook, 35 cents, has a total extended from there——

The Court: What under the regulation should have been on that invoice that wasn't on there?

Miss Gallagher: Well, if it is fish that was caught in the Columbia River by seine, as fish up there is caught, Chinook and dressed, it should show, as he has since then begun to show, Columbia River fresh Chinook dressed.

The Court: All right. Now Mr. Bassett, an obvious comment on what you just said—that they should show you on every day's item what allowance they are making for freight and boxing—is that your client was not complying with the regu-

lation. Should his invoice have shown his charge for freight and boxing, too, [57] Miss Gallagher?

Miss Gallagher: Yes, your honor, stated fully.

The Court: Her answer to it is that, instead of putting her to all the trouble of showing it on each item, it was your client's duty, in the first place, to show it. Does he show it now in his invoices, Miss Gallagher—freight and boxing?

Miss Gallagher: I think not yet.

The Court: He hasn't got around to that yet?

Miss Gallagher: No. Those invoices are starting with March, 1944.

The Court: How could a salesman out on the street know what to show where he wrote an invoice out at the time he made the sale and came back from the restaurant? How could he show the freight and boxing, do you know?

Miss Gallagher: No. I think it might be some difficulty for the salesman himself out on the street to.

The Court: Yes. He says that was the custom—for them to write the invoices.

Miss Gallagher: On the street as they go out?

The Court: On the street, yes.

Miss Gallagher: I don't know what the setup is, whether he could fix the invoices when he comes back or not. I think counsel loses sight of this, your Honor, and I think it is important: That we have already in this first period gone as far as anybody could reasonably be expected to go, and further, in giving him the [58] dressed price for every bit of fish that he sold.

The Court: How much of this claim of \$2130.80 accrued after the amended regulation?

Miss Gallagher: The overcharges from November 9 to December 31, \$1073.51; the overcharges before that period, then are \$1764.00; is that right?

Mr. Holdt: Yes.

The Court: You get \$1057.29. You subtract \$1073.51.

Miss Gallagher: Oh, sure. Well, this figure on the top was made before the corrections were made, I see.

The Court: Now then, you say the matter began of the calculation after the amended regulation, Mr. Bassett?

Mr. Bassett: I didn't have an opportunity to give my notion to that last point.

The Court: Go ahead.

Mr. Bassett: Section 7 provides that this defendant may add his freight and boxing, and I don't understand yet that I have to set it out on my invoices. I am entitled to it by the law, not by virtue of setting it out.

The Court: Oh.

Mr. Bassett: I am entitled to it by the law.

The Court: She said she gave you \$430.03.

Mr. Bassett: Well, I hope your Honor won't think I am either dumb or stubborn, but I think that is going at this in reverse. First, they say, "You have overcharged \$5000.00. Well, we will [59] take off of that a thousand, and a thousand, and a thousand." Now there is no overcharge in

this case, we submit, your Honor. There is no overcharge. There is nothing to take from.

The Court: You haven't proved there is not.

Mr. Bassett: Well, I didn't think I had to, your Honor.

The Court: You say she has not proved there was?

Mr. Bassett:: I thought we were going to come in this court and they were going to go right down that list, and I so told her six or ten times. I have been in the OPA offices at least twelve times in the last ten months, on this case. I thought they would have to prove invoice by invoice. Every time they came up with an invoice like this one we could have shown it. We could have indicated to the Court they are not reasoning right.

The Court: Well, you still have that privilege.

Mr. Bassett: Let her bring each invoice up that she wants, your Honor.

The Court: They are all here. I am supposed to do all of this studying without any further help than has been given so far. They are all here, aren't they? Did you put them all in?

Miss Gallagher: The calculations from the invoices are in, your Honor.

The Court: Put all the invoices in, too. I will need them.

Miss Gallagher: They are in the possession of the defendant, except these sample invoices.

The Court: Yes. You gave them back to them?

[60]

Miss Gallagher: Yes, your Honor.

Mr. Bassett: I meant exactly at the beginning of this case, your Honor, that I was at a loss, because I didn't see how else it could be proven. That is a terrible thing to go before this Court with a thousand items. It would be an interminable thing.

The Court: That is the way things go. I have had worse than that happen.

Mr. Bassett: But that is why I was willing to stipulate with Miss Gallagher anything within reason, except that we didn't overcharge here, and I couldn't stipulate to that.

The Court: Well, of course that does not help me out any. That left me with things where they were. She says, you see, you did. You say you didn't. She has sample invoices here on a certain day the salesman sold salmon, without saying what kind of salmon it was. She gives you the benefit of the highest price that could be charged for salmon on that day. You still charge two cents more than that. You say that two cents was for freight and boxing. Your argument seems to be narrowed down to that point. She says instead of calculating freight and boxing for that particular 17 pounds of salmon that day, that she took the total freight and boxing that you paid over that period and deducted it from the gross, from the total overcharge. I don't see anything the matter with that reasoning, considering what she had to work with.

Mr. Bassett: I believe I can tell you what is wrong with it. [61] If she is giving me back 2 cents, she is crediting it on some other purchase or sale—put it that way, on some other sale—be-

cause she has not shown any overcharge there. I am entitled, under the law, on anything that is here, to 35 cents on that date. She had no two cents to give me. The law, section 7, gives me that 2 cents, not Miss Gallagher.

The Court: Do the freight and boxing run 2 cents?

Mr. Bassett: Yes. There is no question about that. That is the minimum.

The Court: That is the minimum?

Miss Gallagher: I think our figures will be off from Mr. Bassett's within a quarter of a cent, but the matter depends upon where it came from and what state tax was paid. There is one in Washington and one in Oregon.

Mr. Bassett: It can't be less than a cent and a half, and that entitles us to two.

Miss Gallagher: What is that?

Mr. Bassett: It can't be less than a cent and a half. Freight and boxing would not be less than $1\frac{1}{2}$ cent from any point.

Miss Gallagher: I think, your Honor, that we can fairly urge that when the defendant, by his own actions——

The Court: How could she show, Mr. Bassett, with the information available, where that salmon came from, whether the defendant would be entitled to a cent and a half or two cents?

Mr. Bassett: Under their own definitions, your Honor, a cent [62] and a half gives you two. They know it. They know we can't pay it. We would have to get it back. Then she would come to us

and say, "Where did you buy fish on that day? Was it down on the Oregon Coast, or California or Washington?" Well, we submitted all our invoices, where we bought our fish, every one of them, your Honor.

The Court: You might have bought at several places that day?

Mr. Bassett: But none of them that didn't have freight and boxing on it, your Honor.

The Court: Yes, but how could she be specific without knowing where that 17½ pounds of salmon came from?

Mr. Bassett: Well, we are not putting the burden on her, which, I think, of course, the law does, but we are still not putting the burden on her. There is no place we got fish that we didn't pay boxing and freight on.

The Court: You paid a cent and a half some places and two cents other places?

Mr. Bassett: We paid one and a half to three, your Honor, but one and a half gives us two.

The Court: How do you get that?

Mr. Bassett: We are entitled to two cents.

The Court: Under the regulation?

Mr. Bassett: Yes.

The Court: Minimum regulation?

Mr. Bassett: Yes. One and a half gives us two. [63]

The Court: Is that right?

Miss Gallagher: I am not certain I understand Mr. Bassett.

The Court: He says he is entitled in every case to a cent and a half to two cents.

Mr. Bassett: If it is a cent I am entitled to two.

The Court: In other words, in every case entitled to two?

Mr. Bassett: If it is a cent I would be entitled to two.

The Court: That is the first I have heard that.

Mr. Bassett: If, your Honor, there is less than one and a half——

The Court: Is there less than one and a half?

Mr. Bassett: ——I know I am entitled to two. One and a half entitles me to two.

The Court: Is there less than one and a half?

Mr. Bassett: Is there, Joe?

Mr. Jaha: On the boxing, you mean?

Mr. Bassett: Is there less than one and a half? Do you have less than one and a half?

Mr. Jaha: No; $.62\frac{1}{2}$ a cent; then there is a cent freight from Seattle, a cent from Tillamook, except if they come from Astoria that is .75.

Mr. Bassett: Well, that would be 1.65 cents. That is more than a cent and a half, so we would have two.

The Court: The answer, then, is freight and boxing is not less than one and a half in any case?

Mr. Bassett: Yes, that is the answer. [64]

The Court: And that under the regulations you claim that entitles you to two cents?

Mr. Bassett: Yes, your Honor. And I have been advised to that effect by Mr. McCargar many times.

Miss Gallagher: If that is your statement, Mr. Bassett, I shan't—I don't know; I don't think that is correct; but I shan't quarrel with my specialist, because I haven't gone specifically into the question.

The Court: Then on that particular invoice there would be no overcharge on that day?

Miss Gallagher: If it is fresh troll-caught Chinook.

The Court: Well, you presented the case on that theory?

Miss Gallagher: That is right.

The Court: Well, how many more invoices do you have there? You have just a few samples?

Miss Gallagher: A few examples. We have ten or fifteen, I guess.

The Court: All right. If you want to work a while longer we will. If you are tired you can come some other time. Whatever you wish. Say what you wish to say concerning the other invoices allowing two cents in every case for freight and boxing. What are your gross sales in dollars out of which these overcharges amounting to \$2130.80 occur?

Mr. Bassett: What were your gross sales in fish from August to December, where they claim these overcharges? [65]

Mr. Jaha: You mean the gross sales?

Mr. Bassett: Yes.

Mr. Jaha: I don't know.

The Court: What do you say, Mr. Holdt?

Mr. Holdt: I don't have any figures.

The Court: Do you have any idea? Fifty thousand dollars?

(Pause.)

Mr. Bassett: May I suggest it would be closer to twenty thousand.

The Court: How many months involved?

Mr. Bassett: Five, August to December, inclusive.

The Court: He knows about what his fish business is per month. What was it, four or five thousand dollars?

Mr. Bassett: Not oysters, but fish.

Mr. Jaha: That is it—I never keep them separate.

The Court: Oh, don't hedge around. He knows whether he does a fifty thousand dollar a year fish business, or a twenty-five thousand dollar a year fish business. He knows that—whether he does a hundred dollars a day or two hundred dollars a day.

Mr. Bassett: Do you? Well, state to the Court the total volume.

The Court: Let him tell you and then you tell me about how much fish he thought he sold during those five months.

Mr. Bassett: How much?

Mr. Jaha: Oh, about six or seven thousand, I guess; something [66] like that.

Mr. Bassett: What do you mean?

Mr. Jaha: A month.

Mr. Bassett: A month, of fish?

Mr. Jaha: Of fish.

Mr. Bassett: With no oysters?

Mr. Jaha: Well, there was oysters.

Mr. Bassett: Yes. Six or seven thousand a month of fish.

The Court: All right. Is that the idea you had, Mr. Holdt, or do you have anything on that?

Mr. Holdt: The only thing I would have to base an opinion on would be the total amount purchased during that time, which was 175,000 pounds, assuming a 25 per cent loss from that and shrinkage from that 175,000 pounds, and figuring an average price.

The Court: What did he pay for 175,000 pounds?

Mr. Holdt: Well, the sale price——

The Court: What did he pay for it?

Mr. Holdt: Well, the prices vary so greatly, your Honor.

The Court: You don't happen to know. All right. That is all right.

Mr. Bassett: May I try to answer it, your Honor?

The Court: He says six or seven thousand a month.

Mr. Bassett: I am sure that is a generous figure.

The Court: So this \$2130 in overcharges developed out of twenty-five or thirty thousand dollars worth of sales. That is [67] what I want to get. Or about an eight per cent overcharge.

Mr. Bassett: I would like to be able to ask him

—I don't know whether I asked my witness or not, but I imagine they do business on——

The Court: Or about 2 cents a pound in every case.

Mr. Bassett: That is above the margin. What is the margin? One to three cents, is it?

(Mr. Jaha talked to Mr. Bassett in an undertone.)

The Court: All right. Now can you go on and show us some other overcharges there?

Miss Gallagher: There is an invoice No. 38385——

Mr. Bassett: What date?

Miss Gallagher: Dated 8/31, on page 3.

Mr. Bassett: 38385?

Miss Gallagher: That is right. Name, Salmon; order, 28½ pounds; price, 30 cents. We have used for the maximum price 26¼ cents. The ceiling price for troll-caught dressed silvers 26½ cents a pound. Is that right, Mr. Holdt?

(Mr. Holdt conversed with Miss Gallagher in undertone.)

Miss Gallagher: Your Honor, this is exactly the reason that we gave the top price for the whole period of August to November 9, because of the extreme difficulty of going through invoice by invoice. We are not trying to maintain that this was round, or drawn, and rather than to go out and get all the customers in [68] to prove it we will give him the top price on everything.

The Court: All right. Now what does that show?

Miss Gallagher: That shows that the ceiling price used has been the ceiling price during August for troll-caught dressed silvers, all sizes, and it looks like a one-fourth instead of a one-half but it should be——

Mr. Bassett: It should be one-half.

Miss Gallagher: One-half. That is the schedule which has been used to determine what the price should have been on this invoice.

The Court: Well, what did he charge, and what should he have charged?

Miss Gallagher: Oh. He did charge 30 cents per pound. It is our contention he should have charged $26\frac{1}{2}$ cents a pound. Wait now. I made a mistake. He did charge $28\frac{1}{2}$ cents a pound. It is our contention he should have charged $26\frac{1}{2}$ cents a pound.

The Court: Well, he says freight and boxing takes that up again. He says he is entitled to two cents for freight and boxing.

Miss Gallagher: I know he has maintained that—maintained that all the way along—that two cents would take care of his boxing and freight on any overcharge we could show along here, because that was all it was over. I still maintain that he has not shown that there is any box charge. We don't know except from his very general statement here that he had to pay box and freight on everything.

The Court: Did he swear to that? [69]

Miss Gallagher: I think he was sitting here when he said it.

The Court: Put him on the stand, if he will swear to it.

Mr. Bassett: What would you say?

The Court: No. You talk to him off the record.

Mr. Bassett: I want to ask what his testimony is going to be, your Honor.

The Court: I see. Off the record, Mr. Person. He is consulting with his client.

(Mr. Bassett here conferred with Mr. Jaha aside.)

Mr. Bassett: All right. Take the stand.

JOE JAHHA

was thereupon recalled as a witness in behalf of the defendant and, having been previously sworn, further testified as follows:

Direct Examination

By Mr. Bassett:

Q. Mr. Jaha, what percentage of the total amount of your fish do you pay freight and tax and boxing on?

A. I think it is good 90 per cent of it, unless we send our truck sometimes during the Celilo. It still costs us the freight. That is on the round fish. The only thing we have ever got anything without boxing is when we sent our truck; that is, our own

out of all of our discussions, which were [72] all friendly and cooperative, and I think both sides said all they knew about it.

Miss Gallagher: To correct any impression that might be left here, these do not constitute samples for the total number of invoices on which we claim there are overcharges, or on which any agreement was made there might be overcharges. These are invoices we picked up since our first examination and since March, to check to see how carefully his records are being kept.

The Court: You have in your exhibit here about a thousand invoices?

Miss Gallagher: Yes.

The Court: It runs fifty to a page, and you claim an overcharge in every one of them?

Miss Gallagher: Yes, your Honor; and running down the column 5 would show that there are a good many more than counsel would like to give us the impression, on which there is an overcharge of just 2 cents. On some pages the overcharges are alleged at 2 cents. You start down on page 5, the overcharges run from $3\frac{1}{2}$ cents; one 4 cents, one other 4 cents, five or six 4-cent items, a few $2\frac{3}{4}$ cent items, and the rest are three and a half. Other pages show overcharges that are over and above the 2 cents, which he now is claiming that he is entitled to on each invoice. When we start to examine that, if we take an invoice on page 5, in which the overcharge is shown to be $3\frac{1}{2}$ cents, or shown to be 4 cents, then no doubt counsel will get up and argue, "Well, this [73] particular fish came from Puget

Sound, or Vancouver, B. C.; therefore our tax and freight is 4 cents. That is the price for which we are entitled to sell."

The Court: Whether it did or not we don't know.

Miss Gallagher: We have no idea, and no way of knowing. We have no idea what the man sold, except that he has sold certain items of salmon at a certain price. Any filet-ed fish we have left out of consideration and haven't claimed any overcharges.

The Court: So long as you have been so generous and have given him the benefit of every doubt, why didn't you give him the benefit of the doubt every day on the freight and box charges, or whatever it is? Why didn't you give him the benefit of Puget Sound?

Miss Gallagher: Well, we didn't want to give the whole case away, your Hoonr. There are a good many pounds of his fish that had no box charge to it and no freight charge to it.

The Court: He says 10 per cent.

Miss Gallagher: Well, 10 per cent in addition to that which he hauled from Celilo in his own truck.

The Court: How many pounds did he say he bought from Celilo?

Mr. Jaha: About twenty thousand.

Mr. Bassett: Twenty thousand.

The Court: About 20,000 pounds; and about what cost per pound?

Mr. Bassett: How much a pound, Mr. Jaha?

Mr. Jaha: We paid 8 cents up there. [74]

Mr. Bassett: Eight cents.

The Court: About \$1600 worth, out of a total of about \$30,000.00 involved in five months.

Mr. Bassett: On that point, your Honor, I could offer in evidence a copy, an exact copy of our report to the Commission, showing every pound we got, and that would indicate where it came from.

The Court: Well, if you people think I have the time and the ability to take a mass of stuff like this and figure it out item by item, you will have to disabuse your minds of that on both sides.

Miss Gallagher: Well, I don't—

The Court: You don't need to offer anything more, to dump anything more like that in my lap. That will do you more harm than good.

Mr. Bassett: Yes.

The Court: Without an analysis of it.

Mr. Bassett: It is analyzed, your Honor. It is just as simple as can be, I think.

The Court: That is what we are here for. You may put in anything you want to that you think will be helpful. Go ahead, Miss Gallagher.

Miss Gallagher: I was going to say, your Honor, that I think we can take advantage of the inference that can be raised in this case. The party has, by his own willful act, rendered it impossible [75] to show the quality or the value of the property he is being sued for, quoting from Jones on Evidence. "In such cases the inference is very strong that the facts suppressed would be unfavorable to the wrongdoer, and the courts have a right to act upon such a presumption."

A typical leading case which deals with a similar

problem to that is the old one of *Armory v. Delamirie*, in which a jeweler was being sued for the conversion of a precious stone. He didn't bring the stone into court but he did claim that it was of a lesser value than the plaintiff asked for, and the Court instructed the jury that they should find the jewel was of the highest value that would fit into the socket. I think that the case is analogous to ours where a defendant has not shown what he is entitled to, and I think that we can reverse that and maintain properly that the Court could find that he is entitled to the lowest value of that which he sold.

The Court: Does the Price Control Act say anything about burden of proof, or presumption?

Miss Gallagher: On this kind of a question, your Honor?

The Court: Yes, on this kind.

Miss Gallagher: No, it does not. It has a very important discussion of the burden of proof, though, on another question than this. That is the question of willfulness and precaution, which I should like very much to be heard on before we get through.

The Court: All right. Do it right now. [76]

Miss Gallagher: The Act as amended says that such amount shall be the amount of the overcharges, or \$25.00, whichever is greater; and we take it even the amount of the overcharges is greater. "If the defendant proves that the violation of the regulation in question was neither willful, nor the result of failure to take practicable precautions against the occurrence of the violation"—That puts the burden upon the defendant to plead that he was not willful,

and to plead that he had taken practicable precautions to avoid any violations; and it also puts the burden upon him to prove that he was neither willful, nor had he failed to take practicable precautions to avoid any violation.

Willfullness is of two kinds, as I always think of it. One is a man who sets out on July 13th, the effective date of this regulation, and says, "Now I don't like this regulation. I am going to disobey it." We don't maintain that he has done that, but the man who is so completely indifferent to the requirements of the regulation that he totally disregards the requirements of the regulation, is willful to that extent.

When it comes down to the question of whether or not he has taken any practicable precautions, there is no evidence at all offered by the defendant that he has taken any precautions, let alone all practicable precautions. He has continued to make out his invoices as he has in the years past. I have no criticism of what he did in the years past. It may have been businesslike for him, and it may not. It is none of my business to inquire [77] into that. But when he is put under a regulation, as he has been in this instance, and there were specific requirements made, then no matter what his practices as to how his invoices are kept, he is required to follow the regulations, and he has totally and completely disregarded those requirements. He has not, from any evidence he has offered, made any effort to instruct his employees on how to follow the requirements of the regulation and avoid violations.

He does not know yet what the requirements are, apparently, according to his testimony on the stand. He does say that the OPA has changed the regulation—they have changed the interpretation—there have been amendments. We grant that. There are always a good many amendments to attempt to take care of the changes of the seasons, the changes from experience under the regulation. And another thing that causes amendments from time to time to many of the regulations, including this one, is as one of the requirements is put into effect some method is designed for getting around the amendments, or what we call “evasive” practices, and amendments are made to take care of that. I think that the amendment’s requirements have not been changed so as to throw him into confusion and make it impossible to follow. He has not claimed that the prices set on Table E during the period of August 1 to December 31 have changed sufficiently to throw him off on that. The prices are set in dollars and cents; the fish is described by name and by type and style of dressing. [78]

I am frank to say—and as you will soon find out if you ever take a look at the fish regulation—that it is a difficult regulation, and that in order to follow it with any ease, particularly in order to have your employees follow it, a chart such as Mr. Hughes has shown to us is a very convenient thing, rather than running through the pages of the regulations. However, those charts are available. The prices have been digested by the Office of Price Administration, Price Division. Mr. Jaha could have called, could

have gotten the prices, apparently did call sometimes, and, as I understood his statement, the price wasn't right because he could not come out when he sold at that price. I don't know whether he has ever made any inquiry or has ever been interested in determining whether or not the price he paid to the producers are the correct prices. It may be he could not come out because he wasn't buying correctly. I doubt if he took the precaution to find out whether he was being charged the right price, but I am convinced, your Honor, he didn't take any precautions, other than talking to his neighbors, to determine that he was selling at the correct prices, and that his employees were selling at the right prices. He does not offer any evidence that he has posted a notice in his store telling what the prices are. He offers no evidence to show that he has used this chart. The evidence there was Mr. Hughes had made it up, or had used it. He does not show that Mr. Jaha has used it.

He has shown no evidence as to what he has done to his [79] employees when they have come in off the route with these invoices.

He says he has entire responsibility for the OPA regulations. I assume that at least once a day, or at least once a week he has gone through the invoices to see what his business is doing. Anyone who knew the regulation, as he is charged with knowing it, who has taken any precautions at all to follow the requirements of the regulation, would have taken one look at that and seen that he was not following out the regulations.

Then I maintain it was his duty to show that he had done something. If he found that his employees were consistently not following the requirements of the regulations he should have either taken over the responsibility himself and done whatever he has done after now trying to get him to do it, after a great deal of effort on our part. If his failure to take any of the precautions has contributed to his violations—and I think it is perfectly clear, from the whole case, that it has contributed largely to it—then as to the violation and as a matter of law I submit the defendant has not taken practicable precautions, and unless he has taken practicable precautions, then we maintain, your Honor, that he is liable, not for just the amount of the overcharges but for the full treble amount of the overcharges.

The Court: Why did the case stop the first of the year?

Miss Gallagher: I should like to explain that, which will cover a lot of other cases we have, your Honor. The examination of the thousands of invoices—there are, we figured, about [80] a thousand listed here; I don't know how many more than that were examined but a great many, a lot more—takes a good deal of time when you sit and type and copy it off and do your computing.

The Court: You don't know offhand what percentage of the total sales indicated overcharges?

Miss Gallagher: Do you know that, Mr. Holdt?

Mr. Holdt: No, I do not.

Miss Gallagher: We have to stop a case some place. We stopped this at the end of December. Otherwise we can never bring a thing to a head.

Mr. Bassett: We can work for six months computing our overcharges and——

The Court: I thought maybe he had reformed and he was to keep satisfactory records.

Miss Gallagher: I beg your pardon?

The Court: When did you become his advisor, Mr. Bassett?

Mr. Bassett: I was called into this case either December or January of this year.

The Court: After all of this had happened?

Mr. Bassett: Yes, your Honor.

The Court: How much of this did you say a moment ago happened after November 9th, in dollars? You gave me that figure a minute ago.

Miss Gallagher: \$1073.51. [81]

The Court: After November 9th. Now then, after November 9th you didn't give him the benefit of the doubt; you just applied the amended regulation?

Miss Gallagher: Well, we gave him the benefit of the doubt to this extent: that we classed his fish as closely as we could, according to his own classification, by name and by price; so that if his price was up in the category, or troll-caught Chinook, we put it up there. We gave him the round price, the lowest price, for that style of troll-caught, that type of fish, but not the highest price.

The Court: They are all round prices?

Miss Gallagher: Yes, your Honor, whether he sold it all round or not. Probably he didn't. Neither, I think, did he, before November 9th, sell——

The Court: The testimony has been there is no market in round fish.

Miss Gallagher: Yes, that is right. I mean the testimony is that. I can't testify to it myself.

The Court: If that is so, this regulation, literally applied, reaches an impractical result. About what is the difference between—I suppose when he goes up to Celilo he buys them round, doesn't he?

Mr. Bassett: Do you buy them round?

Mr. Jaha: Yes.

Mr. Bassett: Yes. There is one other difference, your Honor, [82] while you are on that subject—chums. Where we claim to have sold a salmon the OPA said it was a chum. There is a difference I think between 18 and 20, and 36 cents, and there is evidence here that a salmon is the only thing it could have been—Chinook. It could not be a chum. I mean, your Honor, while they were being so generous about giving us the benefit of the doubt, they didn't have to give us the benefit of a doubt to say every time we sold a salmon we sold a chum, and it wasn't chum, which was just half the value.

The Court: Any more, Miss Gallagher?

Miss Gallagher: Only to correct the last impression. Salmon listed at 35 cents is given a Chinook price and not a chum price, all on this one page 23, at least after November 9th.

The Court: How could you get round prices if there wasn't any market for round fish?

Miss Gallagher: Round fish sold, you mean?

The Court: Yes.

Miss Gallagher: It is sold by the primary fish wholesaler and by the producer. The producer is the first man who catches it out of the river. The first wholesaler who handles it is the primary shipper.

The Court: Show me how that would work. Turn over to your past November 9th list.

Miss Gallagher: Page 23 is past November 9th.

The Court: No overcharge shown on page 23?

[83]

Miss Gallagher: The overcharges are totaled at the bottom of the page, your Honor. The figures were all the same. The item is all the same, so that it has been carried down to the bottom of the page rather than put into each line.

The Court: Well, page 22, that first item?

Miss Gallagher: 19½ pounds of silvers, sold at 21½ cents.

The Court: 27½ cents.

Miss Gallagher: 27½ cents.

The Court: You gave him 17½.

Miss Gallagher: 17½ cents.

The Court: That is what the fisherman got for it?

Miss Gallagher: Oh, no. In November the fisherman—just a minute. Mr. Holdt, can you tell us? What did the fisherman get on it, if this comes from Celilo? Is that what you are assuming?

The Court: No, I don't want to assume anything. There is a spread of 10 cents there.

Miss Gallagher: Well, this price of 17½ cents is the Table E price. There are A, B, C, D and E.

The Court: What is E?

Miss Gallagher: That is the price for a service and delivery wholesaler, selling to the premises of retailers and restaurants.

The Court: That would be in Mr. Hughes' business?

Miss Gallagher: That would be Mr. Jaha's business.

The Court: No.

Miss Gallagher: I don't know about Mr. Hughes.

[84]

The Court: He just told us that he is—you, Mr. Hughes, sell to people like Mr. Jaha?

Mr. Hughes: Like Mr. Jaha?

The Court: Yes.

Mr. Hughes: Yes, we do.

The Court: And is he an E Man, Miss Gallagher?

Miss Gallagher: No, he is not an E man. He is a wholesaler selling to another wholesaler, either C table man or B table man, depending upon whether he buys his fish——

The Court: I am trying to get an understanding of this big spread here, 10 cents.

Miss Gallagher: That is the spread, your Honor, between dressed and round.

The Court: Yes, but there is no market on round other than by the fisherman, or the fellows out on the river.

Miss Gallagher: Well, there is a round price provided in the schedule.

The Court: You sell round fish, Mr. Hughes?

Mr. Hughes: Some.

The Court: Much?

Mr. Hughes: No.

The Court: Very little?

Mr. Hughes: Yes.

The Court: Who back in the chain handling fish is the last man to sell round? The fisherman catches it and he sells round to [85] somebody.

Mr. Hughes: He sells them to the primary wholesaler. That is the next rung on the line above the fisherman.

The Court: That would be the Columbia River?

Mr. Hughes: The Columbia River Packers Association.

The Court: All right. Now does he buy from them?

Mr. Hughes: Yes, he will buy from them.

The Court: But you buy dressed mostly?

Mr. Hughes: Yes.

The Court: So this 17½ then is what Columbia River paid to the fisherman, Miss Gallagher. That is what I am getting at. This is the fisherman's price?

Miss Gallagher: No, your Honor. The fisherman got less than that.

The Court: Well, this is what some fellow sold round for, and if the first packer dresses the fish, why, there is not any handling of round fish after it leaves the fisherman's hands.

Miss Gallagher: Well, I will get my schedule.

The Court: Is that a fair statement, Mr. Hughes, that I just made?

Mr. Hughes: Well, she is just taking the dressed price, E table, against the round price, E table.

The Court: Well, what does the round price, E table, apply to, to practical men in the trade?

Mr. Hughes: Well, it is not practical. [86]

The Court: Do you have a round price?

Mr. Hughes: There is a round price provided but I don't ever recall using it.

The Court: That is what I am getting at, as a practical matter.

Mr. Hughes: It is not practical, no.

The Court: As a practical matter, if the Columbia River, or somebody like them, were to buy from the fisherman, there is no handling of the fish undressed after that?

Mr. Hughes: That is the practice here.

The Court: Yes. Some people think I have an easy job. Well, I can't decide it now. I won't decide it now because I can't decide it now. I won't give any other reason. So we will adjourn until tomorrow morning.

(Thereupon, at 12:47 o'clock P.M., the foregoing hearing was concluded.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that on Thursday, October 12, 1944, I reported in shorthand all of the proceedings had and evidence given in the above entitled cause before the Honorable Claude McCulloch, Judge, and the proceedings had and evidence given upon said hearing was thereafter caused by me to be reduced to typewriting and the foregoing and hereto attached transcript, pages numbered 1 to 87, both inclusive, constitutes a full, true and accurate record of all of said oral proceedings had and evidence given upon said hearing on said date.

Dated at Portland, Oregon, this 30th day of October, A.D. 1944.

/s/ ALVA W. PERSON

Court Reporter [88]

[Endorsed]: No. 11015. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. Lighthouse Oysters, Inc., an Oregon corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 26, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals of the United
States In and For the Ninth Circuit

No. 11,015

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

v.

LIGHTHOUSE OYSTERS, INC.,

Appellee.

STATEMENT OF POINTS

The points upon which the appellant intends to rely on this appeal are as follows:

1. The District Court erred in failing to find as a matter of fact and in failing to conclude as a matter of law:

a. That each and all of the sales made by appellee as shown on plaintiff's pre-trial exhibit 1 were subject to and covered by Maximum Price Regulation 418;

b. That each and all of said sales were made at prices in excess of the maximum prices established by Maximum Price Regulation 418;

c. That the aggregate amount by which the prices at which said sales were made exceeded the maximum prices established by said Maximum Price Regulations 418 was \$2,047.49;

d. That none of the purchasers to whom said sales were made purchased the commodities involved in said sales for use or consumption other than in the course of trade or business;

e. That appellee failed to take practicable precautions to prevent the occurrence of said violations of said Maximum Price Regulations 418;

f. That appellant was entitled to recover of and from the appellee \$6,132.47.

2. That the District Court erred in failing to find as a matter of fact and in failing to conclude as a matter of law that each and all of the sales made by appellee subsequent to November 9, 1943, as shown on plaintiff's pre-trial Exhibit 1, were made at prices in excess of the maximum prices established by Maximum Price Regulation 418 and that the aggregate amount by which the prices at which said sales were made exceeded the maximum prices established by said regulation was \$1,073.00.

3. That the District Court erred in finding that the defendant is entitled to a credit of two cents per pound as a setoff against said overcharges prior to November 9, 1943.

4. That the District Court erred in failing to find as a matter of fact that appellant's violations of said Maximum Price Regulation 418 were the result of a failure to take practicable precautions against the occurrence of said violations.

5. That the District Court erred in failing to find as a matter of fact and in failing to conclude as a matter of law that the statement furnished the purchasers to whom the sales were made by appellee subsequent to November 9, 1943, as shown on plaintiff's pre-trial Exhibit 1, did not identify the size, grade and type of dressing of the fresh fish sold and that, therefore, the maximum prices at which

appellee was entitled to sell such fresh fish was the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish sold as established by said Maximum Price Regulation 418.

6. That the District Court erred in failing to grant judgment in favor of appellant in accordance with the prayer of the complaint filed herein as amended.

DAVID LONDON

Acting Regional Litigation

Attorney

FRANZ E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed Apr. 3, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant hereby designates the entire certified transcript, including all exhibits, to be contained in the record on appeal in this action.

DAVID LONDON

Acting Regional Litigation

Attorney

FRANZ E. WAGNER

District Enforcement

Attorney

Attorneys for the Appellant.

[Endorsed]: Filed. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Stipulation Concerning Exhibit No. One

It is hereby stipulated and agreed between the parties to the above entitled appeal by and through their respective attorneys that the clerk of the above entitled Court need not print plaintiff's Exhibit No. 1 so identified in the Court below but that said exhibit may be considered on the appeal of this action by the entitled Court to the same extent and with like effect as though it had been so printed.

Dated at Portland, Oregon this 1st day of May, 1945.

F. E. WAGNER

Of Attorneys for Appellant
ALTON JOHN BASSETT

Of Attorneys for Appellee

[Title of Circuit Court of Appeals and Cause.]

ORDER CONCERNING PRINTING OF
TRANSCRIPT

The parties hereto having by stipulation so agreed, it is now by the court

Ordered: That in printing the transcript herein the Clerk omit Exhibit No. 1 in the court below, but that the said exhibit may be considered by the court on this appeal as fully as though printed.

Dated: May 7, 1945.

CURTIS D. WILBUR

Senior U. S. Circuit Judge

[Endorsed]: Filed May 7, 1934. Paul P. O'Brien, Clerk.

No. 11015

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT**

v.

**LIGHTHOUSE OYSTERS, INC., an Oregon Corporation,
APPELLEE**

APPELLANT'S BRIEF

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

FLEMING JAMES, Jr.,
Director, Litigation Division.

DAVID LONDON,
Chief Appellate Branch.

SAMUEL L. COHEN,
*Attorney,
Office of Price Administration,
Washington, D. C.*

FRANZ WAGNER,
CECELIA GALLAGHER,
Enforcement Attorneys, Portland, Oregon

FILED

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PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Jurisdiction.....	1
Statutes and regulations involved.....	1
Statement of facts.....	5
Assignment of errors.....	8
Argument.....	9
I. The Administrator was entitled to a recovery for overcharges on sales after November 9, 1943, in which defendant ad- mittedly failed to identify the fish on its invoices by size, grade and style of dressing.....	12
II. The court erred in allowing two cents a pound credit on all overcharges prior to November 9, 1943.....	17
Conclusion.....	19

TABLE OF CASES

<i>Baker & Co. v. Lagaly</i> , 144 F. (2d) 344.....	17
<i>Bowles v. Case</i> (CCA 9)—F. (2d) —, May 28, 1945.....	16
<i>Bowles v. Meyer</i> (CCA 4) — F. (2d) —, May 1945.....	16
<i>Bowles v. NuWay Laundry</i> , 144 F. (2d) 741.....	16
<i>Bowles v. Willingham</i> , 321 U. S. 503.....	13
<i>Caminetti v. United States</i> , 242 U. S. 470, 490.....	14
<i>Daitz Flying Corp. v. United States</i> , 8 Fed. Rules Service 1.623.....	17
<i>Geo. Van Camp & Sons v. American Can Co.</i> , 278 U. S. 245, 253.....	14
<i>Hamilton v. Rathbone</i> , 175 U. S. 414, 419.....	13
<i>King v. Edward Hines Lumber Co.</i> , 8 Fed. Rules Service 16.32.....	17
<i>Lenroot v. Interstate Bakeries</i> (CCA 8) 146 F. (2d) 325.....	16
<i>Rosenweig v. United States</i> , 144 F. (2d) 30.....	16
<i>Taylor v. United States</i>	16
<i>Yakus v. United States</i> , 321 U. S. 414.....	16
Statutes:	
Emergency Price Control Act of 1942, 56 Stat. 23 50 U. S. C. App. 901—	
Section 2 (a).....	2
Section 2 (g).....	2
Section 4 (a).....	2
Section 205 (e).....	2
Maximum Price Regulation No. 418, 8 F. R. 9366—	
Section 1.....	2
Section 7a.....	3
Section 13 (a).....	4
Section 13 (c).....	5
Statement of considerations.....	9

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11015

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation,
APPELLEE

APPELLANT'S BRIEF

JURISDICTION

This is an appeal by the Price Administrator from a judgment in his favor for the sum of \$252.59, entered in the United States District Court for the District of Oregon on December 11, 1944. The action was brought pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U. S. C. App. Sec. 925 (e)), hereinafter called "the Act." Notice of appeal was filed on February 24, 1945 (R. 15). Jurisdiction of the District Court was invoked under Section 205 (c) of the Act and jurisdiction of this court is invoked under Section 128 of the Judicial Code (28 U. S. C. 225).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and Maximum Price Regu-

lation No. 418, as amended, issued thereunder. The pertinent sections of the Act are Sections 2 (a), 2 (g), 4 (a), and 205 (e). Section 2 (a) authorizes the Price Administrator by order or regulation to establish such maximum price or prices for the sale of commodities as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Section 2 (g) authorizes the Administrator to include in said regulations such provisions as he deems necessary to prevent the circumvention or evasion thereof. Section 4 (a) makes it unlawful to sell or deliver any commodity, or to do or omit to do any act, in violation of any regulation or order issued under Section 2. Section 205 (e) authorizes suits for three times the amount of the overcharge against any person who has sold a commodity at a price in violation of the regulation and gives that right of action to the Administrator under the facts and circumstances of this case.

Maximum Price Regulation No. 418 (8 F. R. 9366), establishing maximum prices for fresh fish and sea food, was issued pursuant to Section 2 of the Act on July 7, 1943, effective July 13, 1943. Section 1 thereof reads as follows:

What this regulation does.—This regulation fixes the maximum prices at which producers and wholesalers may sell fresh fish and seafood. On and after July 13, 1943, the date this regulation takes effect, no producer or wholesaler may sell or deliver any fresh fish or seafood, and no person in the course of trade or business may buy or receive any fresh fish or seafood from a producer or wholesaler at prices higher

than the prices fixed by this regulation. But prices lower than those fixed may be charged or paid.

Section 7 (a), as originally promulgated, read as follows:

Allowance for transportation—(a) When a wholesaler may add his transportation cost to listed prices.—The prices set forth in section 20 list maximum prices for sales by a retailer-owned cooperative, cash and carry, and service and delivery wholesaler, exclusive of container costs and transportation costs incurred in transporting the fish to his established place of doing business. Where such transportation charges have been incurred (excluding local trucking and hauling charges), a wholesaler may add to the maximum prices the actual cost of transportation from the primary fish shipper wholesaler's established place of doing business to his customary receiving point.¹

On August 4, 1943, this section was amended by Amendment No. 3 (8 F. R. 10, 939) effective the same date, to read as follows:

Sec. 7 (a) When a wholesaler may add his transportation cost to listed prices.—The prices set forth in section 20 list maximum prices for sales by a retailer-owned cooperative, cash and carry, and service and delivery wholesaler, exclusive of container costs and transportation costs incurred in transporting the fish to his established place of doing business. Where such transportation charges have been incurred (excluding local trucking and handling

¹ By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

charges), a wholesaler who purchases fresh fish and seafood from a primary fish shipper wholesaler may add to the maximum prices the actual cost of transportation from the primary fish shipper wholesaler's established place of doing business to such wholesaler's customary receiving point, and must record the allowed transportation cost in an invoice to his customer. Any customer of such wholesaler may add to his selling price the transportation cost as shown in the invoice. Where a primary fish shipper wholesaler has a branch warehouse located at a remote point from the market of origin to which it ships fresh fish and seafood, the branch warehouse for the purpose of transportation allowance may be considered a wholesaler who purchases fresh fish and seafood from a primary fish shipper wholesaler. In no instance may transportation costs exceed common carrier rates when such rates are available.¹

Section 13 (a) reads as follows:

Records and reports.—(a) Every person making a sale subject to this regulation and every person in the course of trade or business making a purchase of fresh fish or seafood, subject to this regulation, or otherwise dealing therein, after July 12, 1943, shall keep for inspection by the Office of Price Administration, for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, accurate records of each such purchase or sale, showing the date thereof, the name and address of the buyer and of the seller, the price con-

¹ By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

tracted for or received, the quantity, species, grade, style of dressing of pack of fresh fish or seafood, and the container type and size.¹

By Amendment No. 4 issued August 23, 1943, effective August 25, 1943 (8 F. R. 11734), Section 13 (c) was added to the regulation, which reads as follows:

(c) Every person making a sale of any fresh fish or seafood subject to this regulation shall furnish to the purchaser at the time of delivery a written statement setting forth the date; the name and address of the buyer and seller; the species sold; the quantity, sizes, grades, and styles of dressing of fresh fish and seafood, and the price charged therefor, including a separate statement of the container cost, if any, as provided in section 19, and transportation cost, if any, as provided in section 7.¹

On November 3, 1943 Section 13 (c) was further amended to be effective November 9, 1943 (8 F. R. 15257) by adding the following:

If the statement furnished a purchaser at the time of delivery does not identify the size, grade and style of dressing, the maximum price which may be charged for the fresh fish and seafood involved in the sale is the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish and seafood sold: *Provided*, That this paragraph shall not apply to any sales made at prices listed in Table A in section 20.¹

STATEMENT OF FACTS

The complaint (R. 2), filed on April 28, 1944, charged that the defendant had, since July 13, 1943,

¹ By amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

sold and delivered fresh fish and seafood at prices higher than the maximum prices established by the regulation and its amendments. In his complaint the Administrator had computed these overcharges to be \$3,150.58 and prayed judgment for \$9,451.74, three times the amount of the overcharges. At the trial the Administrator conceded that as a result of a recheck the amount of the overcharges was the sum of \$2,047.49. (R. 45.)

Following a pretrial conference, the District Court entered a pretrial order (R. 6-11), by which it was ordered "that the following facts shall be considered as admitted and established." Between August 5, 1943 and December 31, 1943 defendant sold fish and seafood generally known as Chinook silvers and salmon at the prices set forth in pretrial Exhibit 1. It was admitted that these sales "were subject to the ceiling prices established by Maximum Price Regulation No. 418 as amended" and that "plaintiff's pretrial Exhibit 3 is a table of prices for the species of fresh fish listed in column III of plaintiff's pretrial Exhibit 1, taken from table E of Maximum Price Regulation 418, as amended, and represents the correct maximum prices for those species, sizes and types of dress listed in plaintiff's pretrial Exhibit 3. Defendant did not specify in his invoices the sizes, grades and styles of dress of the fresh fish he sold, as he is required to do by Section 13 (b) [c]² of the Regulation. That as the statement furnished the purchaser at the time of delivery did not identify the size, grade and style of dressing, the maximum price which may

² The pretrial order erroneously refers to Sec. 13 (b).

be charged for the fresh fish involved in the sale after November 3, 1943 is the maximum price for the lowest priced size, grade and style of dressing of the species of fresh fish sold.”

Notwithstanding the foregoing admission and order, the court failed to give effect to Section 13 (c) of the Regulation, and refused to allow any recovery for sales after November 9, 1943, on which the invoices failed to identify the size, grade, and style of fish sold.

Section 7 of the regulation³ allows a wholesaler to add to his maximum price the actual cost of transportation from the primary fish shipper wholesaler's established place of business to his customary receiving point. Plaintiff's pretrial exhibit 2, the correctness of which was admitted and established by the pretrial order, shows the amount paid by defendant for boxing, freight, and tax *all* fresh fish of the type listed on pretrial exhibit 1 and bought by defendant between August 5 and December 31, 1943. The calculations submitted by the Administrator to determine the amount of the overcharges on the sales involved herein gave the defendant credit for all these charges (R. 11, 44, 74-77), but still left overcharges in the sum of \$2,047.49. Notwithstanding that the defendant had already been given credit for these sums, the court again gave the defendant credit for these same items by an arbitrary allowance of 2 cents per pound and adding it to its maximum price (Finding 4, R. 13-14).

³ By Amendment No. 32 (9 F. R. 6452) Sections 6 to 20, inclusive, were redesignated Sections 8 to 22, inclusive.

Upon the foregoing pretrial order and testimony taken at the trial, the court made the following findings of fact (R. 13):

1. That the total alleged overcharges claimed (single damages) amount to \$2,047.49.

2. That the total alleged overcharges prior to November 9, 1943, are in the sum of \$974.49, and the total alleged overcharges subsequent to November 9, 1943, are in the sum of \$1,073.00.

3. That the defendant has overcharged as alleged in the complaint and as is indicated on plaintiff's exhibit "1" prior to November 9, 1943.

4. That the defendant is entitled to a credit of \$0.02 per pound as a set-off against said overcharges prior to November 9, 1943.

The only reason given by the court for disallowing a recovery for overcharges on sales made after November 9, 1943, are contained in its "Memorandum of Decision" (R. 12), reading as follows: "I do not agree with plaintiff's interpretation of the amendment dated November 9, and for that reason do not allow recovery after that date." Accordingly, by eliminating any recovery for sales made after November 9, 1943, and giving the defendant the additional credit of \$0.02 per pound for freight and tax on all sales made prior to November 9, 1943, the court ordered judgment for the Administrator for the sum of only \$252.59. The appeal was taken from that judgment.

ASSIGNMENT OF ERRORS

1. The District Court erred in failing to allow a recovery for overcharges on sales made by the defend-

ant after November 9, 1943, and on which sales the statements furnished to the respective purchasers did not identify the fish by size, grade and style of dressing.

2. That the District Court erred in failing to conclude as a matter of law that each and all of the sales made by appellee subsequent to November 9, 1943, were made at prices in excess of the maximum prices established by Maximum Price Regulation No. 418, as amended, and in failing to conclude that the overcharges on such sales are in the sum of \$1,073.00.

3. That the District Court erred in finding that the defendant is entitled to an additional credit of \$0.02 per pound as a set-off against the overcharges made prior to November 9, 1943.

ARGUMENT

Though the enforcement of all Maximum Price Regulations are important to achieve the over-all purposes of the Emergency Price Control Act, we are here concerned with a regulation which has extremely great significance today because of the existing meat shortage. In his Statement of Considerations filed with the Federal Register at the time he originally issued MPR No. 418, the Administrator said:

Necessity for the Regulation: Fresh fish and seafood are among the major items that figure in the cost of living that heretofore have been exempt from price control. In the General Maximum Price Regulation fish were exempt, except for the processed items, along with agricultural products. The highly fluctuating na-

ture of the industry, its seasonal features, and the high perishability of fish in general, make price control difficult. Then, too, price control must be interlocked with allocation, and this has brought about interdepartmental problems that have taken time and effort to work out. In spite of the hazards, the Office of Price Administration has been compelled to place fresh fish and seafood in the price control program. With the ever increasing demand for fresh fish in the absence of a supply of meat sufficient to meet the demand, prices of fresh fish and seafood have spiralled to an unprecedented high. Stabilization of the cost of living imperatively requires the imposition of controls to reduce these prices.

* * * * *

Current Price History: During the last ten years production of fish in the United States has varied from 2,600,000,000 to 4,900,000,000 pounds per year, the low point coming in 1932 and the high point in 1941. The 1941 production was the highest in the history of the fish industry. The 1942 production of all species of fish and shellfish, however, showed a sharp decline, which is estimated at 3,800,000,000 pounds. A recent estimate of 1943 production has been placed at about 3,650,000,000 pounds.

It is quite evident that production has been on a steady decline since 1941, chiefly due to the war conditions and restrictions.

Demand for fish, on the other hand, has increased during this war due to shortages of other food products. This increased demand continued strongly at the beginning of 1943, and it appears that the demand will exceed

the supply probably for the duration. Shortages of boats and labor and war restrictions on customary fishing grounds make it very unlikely that we will attain any appreciable amount of increased production in the coming years.

In the face of shortage of supply, prices of fish have increased during 1942 and especially 1943, and are now definitely regarded as inflationary. This inflationary price trend has been due to fish shortage as well as to the fact that during the period of general price control fresh fish prices have remained uncontrolled. Historically, prices paid to fishermen for all species of fish have varied somewhat from year to year. The average price for the major species of fish landed at Boston was \$2.79 per 100 pounds in 1939, \$3.45 per 100 pounds in 1940, \$3.85 per 100 pounds in 1941, and \$6.45 per 100 pounds in 1942.

Maximum prices for sales by producers established by the regulation represent average 1942 prices with necessary adjustments to maintain proper differentials between species.

During the first quarter of 1943 fresh fish prices to the fishermen have increased about 55% over the prices of the same period in 1942. In January the average for the major species of fish landed in Boston was \$15.03 per 100 pounds, in February it was \$15.62 per 100 pounds, and in March it was \$16.66 per 100 pounds. In view of this inflationary trend price control of fresh fish becomes mandatory.

The need for the amendment which added Section 13 (c) to the Regulation requiring invoices to specify the size, grade and style of dressing (p. 5, *supra*)

is apparent when it is realized that the maximum prices for salmon range from 11½¢ per pound to 33¢ per pound (R. 40). Unless the information required by this section is available and supplied, neither the purchaser nor the Administrator can determine whether there has been an overcharge.

I

The Administrator was entitled to a recovery for overcharges on sales after November 9, 1943, in which defendant admittedly failed to identify the fish on its invoices by size, grade, and style of dressing

By the pretrial order (IV, R. 7-8) it was established that Column III of Exhibit 1 truly reflected the "species and amount of fish sold and the prices charged therefor." Section VII of the pretrial order (R. 9) finds that pretrial Exhibit 3 truly "represents the correct maximum prices for those species, sizes, and types of dress" involved herein. These were the figures used by the Administrator in determining that the total amount of the overcharges was in the sum of \$2,047.90 (R. 41-45). This calculation was adopted by the court in Finding #1 (R. 13). The uncontradicted evidence establishes, and the pretrial order finds, that defendant did not specify in his invoices the sizes, grades, and style of dress of the fresh fish sold, as it was required to do by Section 13 (b) [c]¹ of the regulation.² Based on this finding,

¹ The pretrial order erroneously mentions Sec. 13 (b).

² Even before Sec. 13 (c) was added to the regulation, it always required that defendant keep records showing the size, grade, and style of dressing. The defendant did not comply with this requirement (R. 24, 41-2).

the court in said pretrial order, correctly concluded that as the statement furnished the purchaser at the time of delivery did not identify the size, grade, and style of dressing, the maximum price which may be charged for the fresh fish involved in the sales after November 3, 1943, is the maximum price for the lowest priced size, grade, and style of dressing of the species of fresh fish sold. The Administrator therefore contends that on this state of the record the court was required to order a recovery on all sales made after November 9, 1943. The only reason given by the court for not ordering a recovery on these sales was that it did "not agree with plaintiff's interpretation of the amendment dated November 9" (R. 12). There was, however, no problem of interpretation or construction before the court. The province of construction and interpretation lies wholly within the domain of ambiguity (*Hamilton v. Rathbone*, 175 U. S. 414, 419) and there is no ambiguity in the regulation involved herein. The amendment unequivocally and unambiguously provides "if the statement furnished a purchaser at the time of delivery does not identify the size, grade, and style of dressing, the maximum price which may be charged for the fresh fish and seafood involved in the sale is the maximum price for the lowest-priced size, grade, and style of dressing of the species of fresh fish and seafood sold" (p. 5, *supra*).

The regulation and its amendment are an exercise of the legislative power of Congress (*Bowles v. Willingham*, 321 U. S. 503) and the courts must give the same effect thereto as though the regulation itself

were enacted by Congress. The Supreme Court has repeatedly held that where the language of a statute is clear and is not inconsistent with the purpose for which it was enacted, it is the duty of the courts to give effect thereto. In such cases the function of the court is to enforce the legislative language and there is nothing to construe. In *Caminetti v. United States*, 242 U. S. 470, 490, the court said:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain and the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the court is to enforce it according to its terms.

The same rule was stated in *Geo. Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253, in the following language:

The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger in the one case of converting what was meant to be open and precise into a concealed trap for the unsuspecting or, in the other, of relieving from the grasp of the statute some whom the legislature definitely intended to include.

But, assuming *arguendo*, that the purpose and intent of the Administrator was in doubt, so that a judicial inquiry to determine that intent were permissible, there is evidence available that he intended exactly what he expressly wrote in the amendment. Section 2 (a) of the Act requires the Administrator

to issue with each regulation "a statement of the considerations involved in the issuance of such regulation or order." Such a statement may well be deemed to establish the so-called "legislative history" of the regulation or amendment and may, in doubtful cases be referred to in determining such legislative intent. In the Statement of Considerations filed with the Federal Register contemporaneously with the amendment itself, the Administrator said:

In the case of many species, size, grade and style of dressing make substantial differences in the price which may be charged. A statement accompanying delivery which merely sets forth the name of the species, without stating the size, grade or style of dressing, is a wholly inadequate record either for the immediate protection of the buyer or for subsequent investigation. Accordingly the accompanying amendment provides that if the seller fails to include on the required statement the size, grade and style of dressing, he may not lawfully charge more than the maximum price specified for the lowest price size, grade or style of dressing of that species.

It is clear beyond the peradventure of a doubt that where the merchant fails to include in the required statement the information demanded by the amendment "he may not lawfully charge more than the maximum price specified for the lowest priced size, grade, or style of dressing of that species."

What the court did in the instant case was not to construe or interpret the amendment. It simply

failed to give it effect. If there was any doubt in the court's mind as to the validity of the regulation, an inquiry into that subject and a determination thereof was expressly withdrawn from its jurisdiction by Section 204 (d) of the Act, which places exclusive jurisdiction to determine such validity in the Emergency Court of Appeals. *Yakus v. United States*, 321 U. S. 414, *Bowles v. Willingham*, 321 U. S. 503; *Rosensweig v. United States* (C. C. A. 9) 144 F. (2d) 30; *Taylor v. United States*, 142 F. (2d) 808; *Bowles v. Case* (C. C. A. 9) — F. (2d) —, May 28, 1945.

It may perhaps be that equitable considerations prompted the court to deny the relief which the Administrator demanded with respect to these sales, but the action here is one at law and equitable considerations can have no part in determining liability on the part of the defendant. Even where the Administrator has asked for equitable relief against a violator under Section 205 (a) of the Act, it has repeatedly been held that the question of the reasonableness or the alleged harshness of a regulation or its impact on a defendant are not factors to be taken into consideration in determining whether or not such equitable relief should be granted under this war-emergency legislation. *Bowles v. Nu Way Laundry* (C. C. A. 10) 144 F. (2d) 741; *Bowles v. Meyer* (C. C. A. 4) — F. (2d) —, May, 1945. See also *Lenroot v. Interstate Bakeries* (C. C. A. 8) 146 F. (2d) 325.

It is respectfully submitted that the court erred in denying a recovery on overcharges occurring after November 9, 1943.

II

The court erred in allowing two cents a pound credit on all overcharges prior to November 9, 1943

Section 7 of the Regulation, as amended by Amendment No. 3 (p. 3, *supra*), provides that the actual transportation costs incurred in transporting the fish to the wholesaler's place of business, not to exceed common carrier rates, may be added to the maximum prices. In addition, Amendment 7 of September 2, 1943, 8 F. R. 12233, authorizes the State Privilege Tax to be added when paid. Pretrial Exhibit 2 (R. 37-39), admitted in evidence (R. 35), was conceded by Paragraph V of the pretrial order (R. 8-9) to be a full, true, and complete summary of the purchase invoices showing the amount of the transportation costs incurred and Privilege Tax actually paid by defendant. It was not disputed nor made an issue in the case. The amount of these charges must therefore be considered as conclusively established in the amount described in said Pretrial Exhibit 2. *Baker & Co. v. Lagaly* (C. C. A. 10th) 144 F. (2d) 344; *King v. Edward Hines Lumber Co.* (Apr. 1945) U. S. Dist. Ct. D. Oregon, 8 Fed. Rules Service 16.32; *Daitz Flying Corp. v. U. S.* (Dist. Ct. E. D. N. Y. March 8, 1945), 8 Fed. Rules Service 16.23.

The Administrator in his analysis and summary of overcharges, the accuracy of which is not challenged, gave credit to the defendant for transportation charges incurred and State Privilege Tax paid (R. 44). These were determined by an examination of defendant's purchase invoices (R. 8). The evidence discloses

that \$2,047.49 was the total amount of the overcharges *after* allowance for Privilege Tax, box charges and freight charges (R. 44-45). The Court allowed two cents a pound in addition. By doing so, the Court gave the defendant credit twice for these charges—once by adopting the analysis submitted by the Administrator and again, by specifically allowing two cents a pound credit. It is obvious that it was error to do so.

Assuming arguendo that this question was in issue, the evidence to sustain a two cents credit per pound was conjectural, uncertain and speculative. The evidence of the appellee was to the effect that freight and tax on 90% of the total amount of his fish was incurred, except the purchases during the Celilo run, which totaled 23,243 pounds. (Exhibit 2, R. 39). The total purchases on which such charges were actually incurred as shown by Exhibit 2 (R. 39) was 44,856 pounds. Nowhere does the defendant show that the amount actually incurred and paid was in excess of the amounts as shown on his purchase invoices as disclosed by Exhibit 2. The evidence on the part of the defendant was vague, uncertain and speculative and could not sustain the set-off allowed by the Court. Furthermore, Section 7 (a) of the Regulation provides that these transportation costs *may be added only when such added transportation cost is shown on the invoice*. The defendant admittedly did not show such items on its invoices and it is, therefore, not entitled to add the cost thereof to its maximum price.

CONCLUSION

It is respectfully submitted that the Court erred in denying a recovery for overcharge on sales after November 9, 1943, and in allowing an additional two cents credit for transportation costs and privilege tax. The judgment should therefore be reversed.

GEORGE MONCHARSH,

Deputy Administrator for Enforcement.

FLEMING JAMES, Jr.,

Director, Litigation Division.

DAVID LONDON,

Chief, Appellate Branch.

SAMUEL L. COHEN, *Attorney,*

Office of Price Administration,

Washington, D. C.

FRANZ WAGNER,

CECELIA GALLAGHER,

Enforcement Attorneys, Portland, Oregon.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation,
APPELLEE.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the
United States for the District of Oregon.

FILED

SEP 12 1945

PAUL P. O'BRIEN,
CLERK

ALTON JOHN BASSETT,
Attorney for Appellee.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, APPELLANT

v.

LIGHTHOUSE OYSTERS, INC., an Oregon Corporation,
APPELLEE.

BRIEF OF APPELLEE

STATEMENT OF FACTS

The appellee adopts the Statement of Fact of the appellant as to all things but the last paragraph of the statement which appears on page 8 of Appellant's Brief.

The appellee contends that the Court was not only justified, but required to find in the amount it did find, even though it held for the appellant, because of the plaintiff's own representations. We refer specifically to two matters. First, the appellant sued for \$3150.25 (disregarding for the purpose of this argument treble damages), and then at the opening of the trial obtained the Court's leave to amend by reducing that figure to \$2047.49. See page 2 of Transcript of Hearing. Second, the statements of both counsel, and the uncontradicted testimony of the defendant convinced the court that the defendant was entitled to 2¢ per pound to compensate him for the cost to him of freight and boxing—a charge that is as old as the fish business—and which is allowed by the regulation. This matter occurs on pages 61 to 65, Transcript of Hearing.

Then when the Court found against the defendant for overcharges prior to November 9, 1943, the plaintiff's exhibit was employed to indicate that those overcharges were not more than \$974.49, and that 36,095 pounds of fish had been sold prior to November 9, 1943, which multiplied by 2¢ per pound entitled the defendant to a credit of \$721.90 and reduced the overcharge to \$252.59, which he tendered to the plaintiff.

POINTS AND AUTHORITIES

The defendant was not guilty of a willful violation of any of the requirements of the Act.

ARGUMENT

It has been impossible for fish dealers on the Pacific Coast to avoid technical violations. The fish business is complex, the species are countless, and the Regulations under the Act are myriad. Counsel for the Administrator stated (beginning on bottom of page 21, Transcript of Record) that "Regulation 418 has very carefully spelled out the requirements for keeping record by those who buy fresh fish and sea food and those who sell it." We seriously suggest, without any intention to be facetious, that Regulation 418, and many other regulations, have been "spelled out" too "carefully". It has been estimated that more than 75,000 printed pages of regulations and requirements and instructions have been circulated officially by the O.P.A., to "spell out" what the Act means.

An example of what we don't believe to be humanly possible for two fish dealers to agree on the meaning of is the following order No. G-103:

“OFFICE OF PRICE ADMINISTRATION
SAN FRANCISCO REGIONAL OFFICE

REGION VIII

ORDER NO. G-103 UNDER SECTION 1499.18(c), AS
AMENDED OF THE GENERAL MAXIMUM PRICE
REGULATION.

COOKED LOBSTER

For the reasons set forth in an opinion issued simultaneously herewith, and under the authority vested in the Regional Administrator of the Office of Price Administration by Section 1499.18 (c) of the General Maximum Price Regulation, it is hereby ordered:

(a) The maximum price of sales of cooked lobster by processors in Region VIII, shall be as follows:

(1) For sales by any producer-processor, except at retail, the maximum price in San Diego, California, shall be \$.305 per pound for cooked lobster 10½" to 13½" in length, and \$.2325 per pound for cooked lobster of more than 13½" in length. In any other locality in Region VIII, the maximum price shall be the price specified in this paragraph plus freight from San Diego, California, to the purchaser's business location.

(2) For sales by any wholesaler-processor to wholesalers other than wholesaler-processors, the maximum price shall be as follows:

(i) When sold to wholesalers located in San Diego, Calif., \$.3425 per pound for lobster of 10½" to 13½" in length, and \$.2650 per pound for lobsters of more than 13½" in length.

(ii) When delivered to localities in Region VIII other than San Diego, California, the prices specified in sub-paragraph (i) above, plus freight from San Diego, California, to the buyer's customary receiving point.

(3) For sales by wholesaler-processors to individual retail stores, purveyors of meals, and industrial, commercial or institutional users, the maximum price shall be as follows:

(i) When undelivered at San Diego, \$.38 per pound for lobsters $10\frac{1}{2}$ " to $13\frac{1}{2}$ " in length, and \$.295 per pound for lobsters of more than $13\frac{1}{2}$ " in length.

(ii) When undelivered in any other locality in Region VIII, the applicable price as specified in sub-paragraph (i) above, plus freight from San Diego, California, to the selling wholesaler-processor's place of business.

(iii) When delivered by common carrier, to the premises of the buyer, the applicable price as specified in sub-paragraph (i) and sub-paragraph (ii) above, plus actual transportation charges to the premises of the buyer."

Neither was it possible for just two employees of the O.P.A. in the same office to agree on their own regulation; and that is why at the opening of the trial the appellant amended its complaint to demand \$2047.49 instead of \$3150.25. That is a difference of \$1102.76 or more than 35%, a rather substantial mistake—and it wasn't a mistake in accounting which even a careful accountant might make, it was a difference between what two employees of the O.P.A. thought the regulations meant.

This defendant knows that both employees can't be right but he knows that both of them might be wrong and that he and his books might be right.

This defendant did not wilfully violate the regulations, if he violated them at all, because the O.P.A.

investigator (Holdt) testified that the defendant was "cooperative" and "helped you all he could". (Transcript of Record, page 47.)

Another serious difficulty in the path of any fish dealer in observing the innumerable and complicated regulations is the almost incredible factors that affect the sale of a single type of fish. A salmon, for example, and we don't pretend to instance all of the factors, could have its price affected by the following factors:

#1: Chinook Salmon caught in the Columbia River:

If from January through March and sold Round the price would range from $22\frac{1}{2}$ to 27¢ according to classification of customer.

If sold Drawn (Dressed with Heads left on) the price range would be 27 to $31\frac{1}{2}$ ¢.

If sold Dressed (Headless) the range could be 30 to 34¢.

If sold Sliced or Filletted the range could be 34 to 39¢.

If caught from April through December all the above figures would be different.

#2: If caught in the Sacramento River the price conditions would be about the same as from the Columbia River except for probable extra freight expense from point of origin to point of shipment, and the higher freight rate from point of shipment to destination.

#3: If caught in Puget Sound the price schedules would be entirely different due to an arbitrary set-up of prices for that area.

#4: If Troll or Ocean caught the schedules would again be different.

- #5: River caught Chinook salmon will shrink in dressing from 18% in early spring to 24% by September 10th, and 32% by early October.
- #6: Any of these Chinook Salmon frozen will undergo certain chemical changes that also change the skin color, and it is extremely difficult for even an expert to distinguish between one species of frozen Chinook and another. Even the color of the meat, and the texture, often change greatly in the freezing process.

We believe that the war emergency required a curb against inflation. But we also believe that it was the intention of Congress—the entire discussion prior to the enactment of the statute as printed in the Congressional Record—to place a ceiling on prices of commodities to the ultimate consumer, without trying to regulate the production or manufacture of the commodity from its native form to the consumer. It is our belief that the objective of this Act, as it relates to the industry here concerned—sea foods—would have been attained better by placing a retail ceiling on a pound of salmon, and by permitting Free Enterprise to work out a distribution of profit on that pound of salmon from the ocean to the table.

The Court did not err in allowing 2 cents a pound credit on overcharges prior to November 9, 1943.

The Regulation then and now allows for actual transportation charges. The defendant testified (Transcript of Record, page 91) "that he paid transportation charges on a good 90 per cent of it, unless we send our truck sometimes during the Celilo." In which event, of course, he paid his transportation charges in another way.

We submit that while our treatment by the O.P.A. employees was uniformly courteous and fair—as they saw it—it was not in conformity with the Regulations and the judgment should be affirmed.

ALTON JOHN BASSETT,

Attorney for Appellant.

Nos. 11018 & 11022

United States
Circuit Court of Appeals
For the Ninth Circuit.

FERNAND CHEVILLARD and GEORGE
PATRON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

vs.

JULIO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,

Southern Division

FILED
OCT 25 1945

PAUL P. O'BRIEN,

CLERK

Nos. 11018 & 11022

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	311
Notice of (Fernand Chevillard)	43
Notice of (George Patron)	45
Notice of (Julio Rodriguez)	48
Praeipie for Contents of Record on (Rodriguez)	309
Praeipie for Contents of Record on (Chevillard and Patron)	73
Statement of Points and Designation of Record on (CCA)	313
Stipulation re Transcript of Record on....	308
Assignment of Errors of Chevillard and Patron	52
Assignment of Errors of Rodriguez.....	303
Bill of Exceptions of Chevillard and Patron...	76
Exhibits for United States:	
5—Delivery Tag, dated Jan. 23, 1945.	205
9—Delivery Tag signed by Rodriguez	206
18—Statement of Fernand Chevillard, Jan. 24, 1945	168

Index	Page
Bill of Exceptions—(Contd.)	
Charge to the Jury	255
Exceptions to Instructions	275
Instructions Requested by Defendants....	284
Motion to Strike out Evidence and Exhibits	189
Stipulation re Settling Bill of Exceptions, etc.	290
Witness—Defendant Fernand Chevillard	
(in own behalf) :	
—direct	234
—cross	248
—redirect	252
Witness—Defendant George Patron (in	
own behalf) :	
—direct	225
—cross	232
Witnesses for Defendant Rodriguez:	
Halstead, George	
—direct	208
—cross	210
Rodriguez, Julio	
—direct	211
—cross	220
Witnesses for United States:	
Barger, Homer	
—direct	154
—cross	155

Index

Page

Witnesses for United States—(Contd.)

Barral, Pierre Francois

—direct	123
—cross	134
—redirect	150
—recross	150

Brandt-Neilson, Melior

—direct	108
—cross	110
—redirect	113
—recross	113

Buggeln, Harold

—direct	117
—cross	117
—redirect	119
—recross	119
—recalled, direct	120
—cross	120

Dowd, Thomas P.

—direct	161
---------------	-----

Goodwin, George Edwin

—direct	183
—cross	184

Halstead, George

—direct	79
—cross	83
—recalled, direct	185
—rebuttal, direct	254

Index	Page
Witnesses for United States—(Contd.)	
Hamburg, Henry	
—direct	113
—cross	115
Heuck, Dean	
—direct	104
—cross	106
Hinman, Elroy	
—direct	89
—cross	97
—redirect	101
—recross	102
Hughes, Sarah	
—direct	157
—cross	158
Hurley, William J.	
—direct	162
Johnson, Dallas A.	
—direct	164
Kinelle, George M.	
—direct	152
—cross	153
Lawler, John	
—direct	121
—recalled, direct	122

Index

Page

Witnesses for United States—(Contd.)

Mancini, Joseph

—direct 156

—cross 156

Marchall, Harold

—direct 85

—cross 87

Roberts, Leslie W.

—direct 184

Schroeder, Herbert W.

—direct 182

Sterks, Michael

—direct 158

—cross 159

Wilson, Ronald A.

—direct 166

—cross 172

—redirect 181

—recalled, direct 183

—cross 183

Certificate of Clerk to Transcript of Record on
Appeal 311

Demurrer of Defendant Julio Rodriguez..... 8

Demurrer to Indictment of Defendants Chevill-
lard and Patron 12

Exceptions Noted to Order Overruling Demurrers
(Minute Order of Mar. 5, 1945)..... 15

Index	Page
Exceptions to Order Denying Motion for Bill of Exceptions (Minute Order of Mar. 5, 1945) ..	15
Indictment	2
Judgment and Sentence (Minute Order of Mar. 19, 1945)	28
Judgment and Commitment of:	
Fernand Chevillard	33
George Patron	35
Julio Rodriguez	37
Minute Orders:	
Feb. 10, 1945—Pleas of Not Guilty, Order Overruling Demurrers	13
Mar. 5, 1945—Order Denying Motion for Bill of Particulars, Exceptions and Ex- ceptions to Order Denying Demurrers...	15
Mar. 6, 1945—Trial, Jury Impaneled	16
Mar. 7, 1945—Trial Resumed	18
Mar. 8, 1945—Trial Resumed	19
Mar. 9, 1945—Trial Resumed	19
Mar. 13, 1945—Ordered Motions for Di- rected Verdict Denied	20
Mar. 14, 1945—Ordered Motions for Di- rected Verdict of Not Guilty Reserved..	23

Index

Page

Minute Orders—(Contd.)

Mar. 15, 1945—Ordered Motions for Directed Verdict Denied	24
Mar. 16, 1945—Verdict	25
Mar. 19, 1945—Judgment and Sentence...	27
Apr. 2, 1945—Order Bill of Exceptions be Filed	51
May 15, 1945—Order Extending Time to Settle and File Bill of Exceptions and to File Assignments of Error	75
July 5, 1945—Order Extending Time to Settle and File Proposed Bill of Exceptions, etc.	302

Motions in Arrest of Judgment by Chevillard and Patron	40
--	----

Motions for New Trials by Chevillard and Patron	41
---	----

Names and Addresses of Attorneys of Record	1
--	---

Notice of Appeal by:

Fernand Chevillard	43
George Patron	45
Julio Rodriguez	48

Order Denying Motion for Bill of Exceptions and Exceptions thereto (Minute Order of Mar. 5, 1945)	15
---	----

Index	Page
Order Denying Motion for Directed Verdict (Minute Order of Mar. 13, 1945)	20
Order Denying Motions for Directed Verdict (Minute Order of Mar. 15, 1945)	24
Order Extending Time to Settle and File Bill of Exceptions and to File Assignments of Errors (Minute Order of May 15, 1945)....	75
Order Extending Time to Settle and File Pro- posed Bill of Exceptions (Minute Order of July 5, 1945)	302
Order Overruling Demurrers (Minute Order of Feb. 10, 1945)	13
Order re Filing Bill of Exceptions.....	51
Order Reserving Motions for Directed Verdict of Not Guilty	23
Order Settling Bill of Exceptions	291
Pleas of Not Guilty	13
Praeipie for Contents of Record on Appeal by: Chevillard and Patron	73
Rodriguez	309
Proposed Additions to Bill of Exceptions (Pro- posed by Appellants Chevillard and Patron, by Julio Rodriguez	293
Statement of Points and Designation of Record on Appeal (CCA)	313
Stipulation re Transcript of Record on Appeal	308

Index**Page**

Stipulation Relating to Additions of Testimony Applicable to Julio Rodriguez, to Bill of Ex- ceptions on File Herein by Chevillard and Patron and United States of America.....	306
Verdict	27
(Minute Order of March 16, 1945).....	25

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Attorney for the Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29193-S

FIRST COUNT

(Title 18 U.S.C.A. Section 80):

In the November, 1944, Term of said Division of said District Court, the Grand Jurors upon their oaths present:

That Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, whose full and true names, and the full and true name of each of whom, except as herein mentioned, are otherwise unknown to this grand jury (hereinafter called said defendants), on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, relating to a material fact, to wit, the receipt of certain meat ordered by and for the use of the said War Shipping Administration, which said statement and representation was false and fraudulent as follows:

That the said defendants, well knowing at all times

herein mentioned that the said War Shipping Administration had issued its orders to the Ed Heuck Company of San Francisco, [1*] California, (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for certain meat to be delivered to the said War Shipping Administration, falsely stated and represented to the said War Shipping Administration that approximately 64,793 pounds of meat had been delivered by the said Ed Heuck Company to the said War Shipping Administration and had been received by the said War Shipping Administration, when in truth and in fact, as the said defendants and each of them then and there well knew, only approximately 46,961 pounds of meat had been delivered by the said Ed Heuck Company for the use of the said War Shipping Administration.

SECOND COUNT

(Title 18 U.S.C.A. Section 80):

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre François Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did

*Page numbering appearing at foot of page of original Reporter's Transcript.

knowingly, wilfully, unlawfully, and feloniously cover up and conceal by a trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, the material facts so covered up and concealed by a trick, scheme and device being as follows:

That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had ordered from the Ed Heuck Company of San Francisco (a limited [2] partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; and A. Pasquini, limited partner; hereafter referred to as the Ed Heuck Company) approximately 64,793 pounds of meat, to be delivered by the said Ed. Heuck Company to the said War Shipping Administration, diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use, and with intent to defraud the said War Shipping Administration covered up and concealed said material fact of said diversion and conversion by the said defendants of said approximate amount of 17,832 pounds of meat by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

THIRD COUNT

(Title 18 U.S.C.A. Section 88):

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did, in violation of Title 18 U. S. C. A. Section 88, unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers persons whose names are to the Grand Jurors unknown, to commit offenses against the United States to wit, to defraud the United States in violation of Title 18 U.S.C.A. Section 80 in the manner following, to wit: [3]

That the said defendants at all times herein mentioned, knowing that the War Shipping Administration, a department and agency of the United States, had placed a purchase order with the Ed Heuck Company of San Francisco, California (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for approximately 64,793 pounds of meat for delivery to the said War Shipping Administration and for its use, conspired, confederated, and agreed together to cause the said Ed Heuck Company to present a claim, false in part,

to the said War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat would actually be delivered to the said War Shipping Administration by the said Ed Heuck Company; and by the said defendants making and causing to be made false statements and representations in a matter within the jurisdiction of the said War Shipping Administration, to wit, that approximately 64,793 pounds of meat had been received by the said War Shipping Administration from the said Ed Heuck Company, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat had actually been delivered to and received by the said War Shipping Administration; and by the said defendants covering up and concealing by trick, scheme, and devise a material fact relating to a matter within the jurisdiction of said War Shipping Administration, to wit, said material fact being that the said defendants had diverted to their own use and personal gain approximately 17,832 pounds of meat from a [4] shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of said War Shipping Administration from the said Ed Heuck Company, and covered up and concealed said material fact by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration,

a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

That during the existence of said conspiracy and in furtherance of the same, and to effect the objects thereof, in said Division and District and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to wit:

1. That on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Julio Rodríguez and Pierre Francois Barral met and held a conversation with one Elroy Hinman;

2. That on or about the 18th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Pierre Francois Barral, George Patron, Fernand Chevillard, and Lucien L. De Angury met and held a conversation;

3. That on or about the 22nd day of January, 1945, the said defendant Fernand Chevillard telephoned from the City and County of San Francisco, State of California, to the said defendant Angelo Italo Vincenzini at the City of South San Francisco, State of California;

4. That on or about the 23rd day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Lucien L. De Angury and Pierre Francois Barral drove a truck loaded with approximately 17,832 pounds of meat from the City and County of San Francisco, State of [5] California, to the City of Millbrae, County of San Mateo, State of California;

5. That on or about the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, the said defendant Julio Rodriguez signed a receipt from the Ed Heuck Company for 64,793 pounds of meat;

6. That on or about the 23rd day of January, 1945, in the City of Millbrae, County of San Mateo, State of California, the said defendants Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, and Lucien L. De Angury unloaded from a truck approximately 17,832 pounds of meat and placed the same in cold storage on the premises of the defendant Clarence Valentine Jacky.

FRANK J. HENNESSY,
United States Attorney.

TOM C. CLARK,
Assistant Attorney General.

[Endorsed]: A true bill, D. Bosschart, Foreman.

Presented in open court and ordered filed Jan. 31, 1945.

C. W. CALBREATH,
Clerk. [6]

[Title of Court and Cause.]

DEMURRER OF DEFENDANT JULIO
RODRIGUEZ

Now comes the defendant Julio Rodriguez (hereinafter referred to as "said defendant"), and not waiving his right to plead not guilty to the indict-

ment heretofore filed herein, files his demurrer to said indictment, and for grounds of demurrer specifies:

I.

That the first count of the indictment does not allege facts sufficient to constitute an offense under the laws of the United States.

II.

That the first count of the indictment is uncertain in this, that it does not appear nor can it be ascertained therefrom

(a) To what department and agency of the United States, if any, said defendant made or caused to be made a false or fraudulent statement and representation in a matter within the jurisdiction of the War Shipping Administration.

(b) How or in what manner said defendant made or caused to be made a false and fraudulent statement and representation to any department or agency of the United States.

III.

That the first count of said indictment is ambiguous for the reasons stated in paragraph II hereof.

IV.

That the first count of said indictment is indefinite for the reasons stated in paragraph II hereof.

V.

That the second count of said indictment does not allege facts sufficient to constitute an offense under the laws of the United States. [7]

VI.

That the second count of the indictment is uncertain in this, that it does not appear nor can it be ascertained therefrom:

(a) Whether or not said material fact alleged to have been covered up and concealed by a trick, scheme and device was in "any matter" within the jurisdiction of any department or agency of the United States.

(b) How or in what manner the diversion and conversion by the defendants of approximately 17,832 pounds of meat is a material fact in a matter within the jurisdiction of the War Shipping Administration.

VII.

That the second count of the indictment is ambiguous for the reasons stated in paragraph VI hereof.

VIII.

That the second count of the indictment is indefinite for the reasons stated in paragraph VI hereof.

IX.

That the third count of said indictment does not allege facts sufficient to constitute an offense under laws of the United States.

X.

That the third count of said indictment is uncertain in this, that it does not appear nor can it be ascertained therefrom: How or in what manner said defendant agreed to cause the said Ed Heuck Com-

pany to present a claim, false in part, to the said War Shipping Administration for payment from said War Shipping Administration.

XI.

That the third count of said indictment is ambiguous for the reasons stated in paragraph X hereof.

XII.

That the third count of said indictment is indefinite for the reasons stated in paragraph X hereof.

XIII.

That each of the counts of the indictment herein is uncertain, ambiguous and indefinite in that it does not appear from said counts how or in what manner said defendant, if at all, participated in the commission of any of the acts alleged to have been committed in said counts.

Wherefore, said defendant prays that this demurrer be sustained as to each and every count of said indictment and that said indictment and each and every count thereof be dismissed as to him.

JAMES B. O'CONNOR,

Attorney for Julio Rodriguez,
Defendant.

[Endorsed]: Filed Feb. 9, 1945. [9]

[Title of Court and Cause.]

DEMURRER TO INDICTMENT OF DEFENDANTS CHEVILLARD AND PATRON

Come now Fernand Chevillard and George Patron, two of the defendants named in the above action, and jointly and severally demurring to the indictment on file herein and to each count thereof, each of said defendants for grounds of demurrer specifies:

I.

That the first count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

II.

That the second count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

III.

That the third count of said indictment does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

IV.

That the first count of said indictment is uncertain in that it cannot be ascertained therefrom what purpose or intent was involved on the part of each of said demurring defendants in the alleged making and causing to be made of said false and fraudulent representation. [10]

Wherefore each defendant prays that this his de-

murrer be sustained and that he be allowed to go hence without day.

Dated: February 8th, 1945.

LEO R. FRIEDMAN,

Attorney for said Defendants.

Copy of the foregoing demurrer received this 9th day of February, 1945.

FRANK J. HENNESSY,

By V. C. HAMMACK,

Special Assistant to the
Attorney General.

[Endorsed]: Filed Feb. 9, 1945. [11]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 10th day of February, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable A. F. St. Sure, District Judge.

No. 29193

UNITED STATES OF AMERICA,

vs.

JULIO RODRIGUEZ, PIERRE FRANCOIS
BARRAL, FERNAND CHEVILLARD,
GEORGE PATRON, CLARENCE VALEN-
TINE JACKY, LUCIEN L. DE ANGURY
and ANGELO ITALO VINCENZINI.

PLEAS OF NOT GUILTY, AND ORDER
OVERRULING DEMURRERS

This case came on regularly this day for entry of plea. Valentine C. Hammack, Esq., Special Assistant United States Attorney, was present on behalf of the United States. The defendants were present with their respective attorneys, viz: Sol A. Abrams, Esq., for Pierre Francois Barral and Lucien L. De Angury; A. J. Zirpoli, Esq., for Angelo Italo Vincenzini; Leo Friedman, Esq., for Fernand Chevillard, and George Patron; Mr. Reisner for Julio Rodriguez, and Mr. Mahoney for Clarence Valentine Jacky. Defendants Julio Rodriguez, Lucien L. De Angury and Pierre Francois Barral were in custody of the United States Marshal; the remaining defendants were at large on bond heretofore given.

The defendants were called to plead and thereupon each [12] defendant pleaded "Not Guilty" to the Indictment filed herein, which said pleas were ordered entered.

Mr. O'Connor requested and was granted permission by the Court to withdraw as counsel for defendant Julio Rodriguez.

After hearing the attorneys, it is ordered that the demurrers of all defendants to the Indictment herein be and the same are hereby overruled. Ordered that this case be continued to February 16, 1945, to be set for trial. The motion of defendant Julio Rodriguez for reduction of bail was ordered denied. Further ordered that defendants Julio Rodriguez, Lucien L. De Angury and Pierre Francois Barral in default of bail be remanded to the custody of the United States Marshal. [13]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 5th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

Order Denying Motion for Bill of Particulars; Also Noting Exception re Court's Ruling on Demurrers Heretofore Made; Etc.

In this case Leo R. Friedman, Esq., attorney for defendant Fernand Chevillard and George Patron,

made a motion for a Bill of Particulars. After hearing the arguments of Mr. Friedman and Valentine C. Hammack, Esq., Special Assistant Attorney General, it is ordered that said motion be denied and to which ruling of the Court an exception was noted. Further ordered that an exception be noted as to all defendants as to the ruling on demurrers heretofore made by Hon. A. F. St. Sure, District Judge. Order that this case be continued to March 6, 1945, for trial.

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 6th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL—JURY IMPANELED

This case came on regularly this day for trial. Valentine C. Hammack, Esq., Special Assistant Attorney General, appeared on behalf of the United States. The defendants Fernand Chevillard and George Patron were present with their attorneys, Leo R. Fried-

man, Esq., and John B. Molineri, Esq. Defendant Clarence Valentine Jacky was present with his attorneys, Sol A. Abrams, Esq., and E. C. Mahoney, Esq. Defendant Angelo Italo Vincenzini was present with his attorney, A. J. Zirpoli, Esq. Defendant Julio Rodriguez was present in the custody of the United States Marshal. Herbert Resner, Esq., appeared as attorney for defendant Julio Rodriguez. Thereupon the following persons, viz: Mrs. Jean G. Conlon, Jonathan H. Cosbie, Albert S. Everett, Harry A. Fialer, [15] Vernon M. Brown, Frank C. Ferns, Laurette J. Apel, Ethel L. Fairbairn, Frances Faivre, Mrs. Blanche T. Chapman, Miss Alice Clemens, Arthur C. Farris, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Hammack made a statement to the Court and jury on behalf of the United States. George Halstead, Harold Marchal and Leroy Hinman were sworn and testified on behalf of the United States. Mr. Hammack introduced and filed in evidence United States Exhibits 1, 2, 3, 4 and 5. The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to March 7, 1945, at 10 o'clock A. M.

Ordered that defendant Julio Rodriguez be remanded into the custody of the United States Marshal. [16]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 7th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled being present, the trial of this case was this day resumed. Leroy Hinman resumed the stand for further cross examination. Dean Heuck, Melior Brandt Neilson, Henry Hamburg, Harold Buggeln, John Lawler and Pierre Francois Barral were sworn and testified on behalf of the United States. Mr. Hammack introduced in evidence and filed U. S. Exhibits Nos. 6, 7 a-b-c, and 9; and introduced for identification U. S. Exhibits 8 a-b-c and 10 a-b. On motion of Mr. Hammack, it is ordered that Mr. Hammack be allowed to withdraw U. S. Exhibit No. 10 a and b for identification until March 8, 1945. Mr. Abrams introduced defendant's Exhibits A 1-5 and B for identification. The hour of adjournment having arrived, ordered further trial of this case be continued to March 8, 1945, at 10 A. M. Ordered defendant Julio Rodriguez remanded to custody of United States Marshal. [17]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 8th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled being present as heretofore, trial was resumed. Pierre Francois Barral resumed the stand for further testimony. George Kinelle, Homer Barger and Joseph Mancini were sworn and testified on behalf of the United States. John Lawler and Harold Bugeln were recalled for further testimony. Mr. Hammack introduced in evidence and filed U. S. Exhibits Nos. 11, 12, and 10 which were formerly 10 a and b for identification. The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to March 9, 1945, at 10 A. M. [18]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern Dis-

trict of California, held at the Court Room thereof, in the City and County of San Francisco, on **Friday**, the 9th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled being present as heretofore, the further trial of this case was this day resumed. Sarah Hughes, Michael Sterks, Thomas P. Dowd, William J. Hurley, Dallas A. Johnson, Ronald A. Wilson, Herbert H. Schroeder and George Van Gerpen were sworn and testified on behalf of the United States. Mr. Hammack introduced in evidence and filed U. S. Exhibits Nos. 14, 15 a-b-c, 16, 17, 18, 19, 20 and 21. The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to March 13, 1945, at 10 o'clock A. M. [19]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof,

in the City and County of San Francisco, on Tuesday, the 13th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

TRIAL RESUMED—ORDERED MOTION FOR
DIRECTED VERDICT ON BEHALF OF
DEFENDANTS PATRON AND CHEVIL-
LARD DENIED

The parties hereto and the jury heretofore impaneled being present, the further trial of this case was this day resumed. Mr. Abrams introduced Defendant's Exhibit C for identification. George Edwin Goodwin and Leslie W. Roberts were sworn and testified on behalf of the United States. George Halstead was recalled for further testimony. In the absence of the jury, Mr. Zirpoli made motions to strike certain testimony and for a directed verdict of acquittal, and for dismissal of the Indictment as to the defendant Angelo Italo Vincenzini. After hearing the arguments of Mr. Zirpoli and Mr. Hammack, it is ordered that the said motions be granted and that the Indictment be dismissed as to said defendant Angelo Italo Vincenzini, and that his bond be exonerated. Mr. Abrams made a motion [20] for a directed verdict of acquittal and for dismissal of the Indictment as to defendant Clarence Valentine Jacky. After hearing the arguments of Mr. Abrams and Mr. Hammack, it is Ordered that said motion

be granted and that the Indictment as to defendant Clarence Valentine Jacky be dismissed, and that his bond be exonerated. On behalf of the defendants Fernand Chevillard and George Patron, Mr. Friedman made motions to strike out certain testimony of the witnesses Halstead, Barral, Hinman, Neilson, Hamburg and Sterks; motions to exclude from evidence exhibits Nos. 1, 4, 5, 6, 9, 13 and 18; and motions for directed verdict of not guilty on each of Counts One, Two and Three. After hearing the arguments with respect to each motion by Mr. Friedman, the Court ordered that each motion be denied. Mr. Resner, on behalf of the defendant Julio Rodriguez, made motions to strike Exhibits 1, 3, 4, 5, 6, 7 a-b-c, 9, 10, 11, 12, 13, 16 and 17; motions to strike certain testimony of the witnesses Hinman, Barral, all agents of the Federal Bureau of Investigation, except Johnson, Kinelle, Mancini, Halstead, Marchal, Hamburg and Buggeln; and motion for a directed verdict of acquittal. After hearing the arguments of Mr. Resner, Ordered each of said motions denied.

Thereupon the jury was returned to the Court Room. George Halstead and Julio Rodriguez were sworn and testified on behalf of the defendants. Mr. Resner introduced in evidence and filed Defendant's Exhibits D, E and F. The hour of adjournment having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to March 14, 1945, at 10 o'clock A.M.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

TRIAL RESUMED—ORDERED MOTION FOR
DIRECTED VERDICT OF NOT GUILTY
RESERVED

The parties hereto and the jury heretofore impaneled being present, the trial of this case was this day resumed. Julio Rodriguez resumed the stand for further testimony. George Patron and Fernand Chevillard were sworn on behalf of the defendants; and the defendants rested. George Halstead and Dallas A. Johnson were recalled for rebuttal. Mr. Hammack introduced in evidence and filed U. S. Exhibit No. 22. In the absence of the Jury, Mr. Friedman made motions for directed verdict of not guilty on behalf of defendants Fernand Chevillard and George Patron. Mr. Resner made a motion for directed verdict of not guilty on behalf of defendant Julio Rodriguez. The Court ordered ruling on said motions reserved. The jury returned into Court. Mr. Friedman filed in evi-

dence [22] Defendant's Exhibit A, on behalf of defendants Fernand Chevillard and George Patron, formerly Defendant's Exhibit C for identification. The Court, after admonishing the jury, ordered that the further trial of this case be continued to March 15, 1945, at 10 A. M. [23]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 15th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

TRIAL RESUMED—ORDERED MOTION FOR
DIRECTED VERDICT DENIED

The parties hereto and the jury heretofore impaneled being present as heretofore, trial was resumed. Dallas A. Johnson was recalled for further testimony, and the evidence was closed. Ordered that the motions for directed verdicts made on March 14, 1945, by Mr. Friedman and Mr. Resner upon which ruling was reserved be denied. Mr. Hammack, Mr. Friedman and Mr. Resner made arguments to the jury. The hour of adjournment

having arrived, the Court, after admonishing the jury, ordered that the further trial of this case be continued to March 16, 1945, at 10 a.m. [24]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday the 16th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

TRIAL RESUMED—VERDICT

The parties hereto and the jury heretofore impaneled being present as heretofore, trial was resumed. After concluding argument by Mr. Hammack and the instructions of the Court to the jury, the jury at 11:53 a.m., retired to deliberate upon its verdict. At 4:53 P.M. the jury returned into Court and upon being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered recorded, viz:

“We, the Jury, find as to the defendants at the bar as follows:

Fernand Chevillard—Not Guilty as to Count 1. Guilty as to Count 2. Guilty as to Count 3.

George Patron—Not Guilty as to Count 1. Guilty as to Count 2. Guilty as to Count 3. [25]

Julio Rodriguez—Guilty as to Count 1. Guilty as to Count 2. Guilty as to Count 3.

Clarence Valentine Jacky—Not Guilty on all Counts, per direction of the Court.

Angelo Italo Vincenzini—Not Guilty on all Counts, per direction of the Court.

A. S. EVERETT,
Foreman.”

Upon being asked if said verdict as recorded is the verdict of the jury, each juror replied that it is. At the request of Mr. Friedman, the jury was polled. Ordered that the jury be excused from further consideration of this case and from attendance upon the Court until notified to report.

On motion of Mr. Friedman, it is ordered that the matter of pronouncing of judgment herein be continued to March 19, 1945, at 10 a.m. Further ordered that the defendants be remanded to the custody of the United States Marshal to await judgment, and that mittimus issue. [26]

* * * *

In the Southern Division of the United States
District Court for the Northern District of
California

No. 29193-G

THE UNITED STATES OF AMERICA

vs.

RODRIGUEZ, et al.

VERDICT

We, the Jury, find as to the defendants at the bar
as follows:

Ferrand Chevillard: Not Guilty as to Count 1.
Guilty as to Count 2. Guilty as to Count 3.

George Patron: Not Guilty as to Count 1. Guilty
as to Count 2. Guilty as to Count 3.

Julio Rodriguez: Guilty as to Count 1. Guilty
as to Count 2. Guilty as to Count 3.

Clarence Valentine Jacky: Not Guilty on all
counts per direction of the Court.

Angelo Italo Vincenzini: Not Guilty on all counts
per direction of the Court.

A. S. EVERETT

Foreman.

[Endorsed]: Filed March 16, 1945. [27]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the
United States District Court for the Northern Dis-

trict of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 19th day of March, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

JUDGMENT AND SENTENCE

This case came on regularly this day for pronouncing of judgment. The defendant Julio Rodriguez was present in the custody of the United States Marshal and with his attorney, Herbert Resner, Esq. James Burns, Esq., Special Attorney, was present on behalf of the United States.

The defendant was called for judgment. Mr. Resner made a motion in arrest of judgment; motion for new trial; and a motion for probation, which said motions were ordered denied. After hearing the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, Julio Rodriguez, [28] having been convicted on the verdict of the jury of guilty of the offenses charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts One, Two and Three of the Indictment.

It Is Further Ordered that the sentences of imprisonment imposed on defendant, in this case, on Counts One and Two of the Indictment commence and run concurrently, and that the sentence of imprisonment imposed on defendant on Count Three of the Indictment commence and run at the expiration of the sentences of imprisonment imposed on defendant on Counts One and Two of the Indictment.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

This case also came on regularly this day for pronouncing of judgment as to the defendants Fernand Chevillard and George Patron. The defendants were present in the custody of the United States Marshal and with their attorney, Leo Friedman, Esq. James Burns, Esq., Special Attorney, was present on behalf of the United States.

The defendants were called for judgment. Mr. Friedman made a motion for a new trial and a motion in arrest of judgment [29] on Count Two of the Indictment. After hearing the arguments of the attorneys, it is Ordered that the said motions be denied. After hearing the attorneys, and said defendants having been now asked whether they have

anything to say why judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendants Fernand Chevillard and George Patron, having been convicted on the verdict of the jury of guilty of the offenses charged in the Second and Third Counts of the Indictment, be and each is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts Two and Three of the Indictment.

It Is Further Ordered that the sentence of imprisonment imposed on each defendant on Count Three of the Indictment commence and run at the expiration of the sentence of imprisonment imposed on said defendants on Count Two of the Indictment.

(Jury returned Verdict of Not Guilty as to Count One of the Indictment.)

Ordered that judgment be entered herein as to each of said defendants.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitments herein.

The Court recommends commitment to a U. S. Penitentiary.

Mr. Friedman filed Notice of Appeal and made a motion for release of defendants on bail pending

appeal, which said motion was ordered granted, and that bail on appeal be fixed at \$15,000.00 each. [30]

This case also came on regularly this day for the pronouncing of judgment as to defendant Pierre Francois Barral. The defendant was present in the custody of the United States Marshal and with his attorney, Sol A. Abrams, Esq. James Burns, Esq., Special Attorney, was present on behalf of the United States.

The defendant was called for judgment. After hearing the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant Pierre Francois Barral, having been convicted on his plea of "Guilty" of the offenses charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts One and Two of the Indictment; and be imprisoned for the period of One (1) Year on Count Three of the Indictment.

It Is Further Ordered that the sentences of imprisonment imposed on defendant, in this case, on Counts One and Two of the Indictment commence and run concurrently, and that the sentence of imprisonment imposed on defendant on Count Three of the Indictment commence and run at the expiration of the sentences of imprisonment imposed on

defendant on Counts One and Two of the Indictment.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and [31] that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

This case also came on regularly this day for the pronouncing of judgment as to the defendant Lucien L. De Angury. The defendant was present in the custody of the United States Marshal and with his attorney, Sol A. Abrams, Esq. James Burns, Esq., Special Attorney, was present on behalf of the United States.

The defendant was called for judgment. Mr. Abrams made a motion to withdraw plea of Guilty and to plead Not Guilty to Counts One and Two of Indictment. After hearing the attorneys, it is ordered that this case be continued to March 20, 1945, for pronouncing of judgment and for hearing on said motion to withdraw plea. [32]

District Court of the United States, Northern
District of California, Southern Division

No. 29193-S Criminal Indictment in three counts
for violation of Title 18 U.S.C.A. Sections 80
and 88.

UNITED STATES

v.

FERNAND CHEVILLARD

JUDGMENT AND COMMITMENT

On this 19th day of March, 1945, came the United States Attorney, and the defendant Fernand Chevillard appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offenses charged in the 2nd & 3rd Cts. of Ind. in the above-entitled cause, to wit: Viol. Title 18 USCA Sec. 80. Count II. Defendant did, on January 23, 1945, in Oakland, Calif., conceal a material fact in a matter within the jurisdiction of the War Shipping Administration, to-wit: diversion for his own use, of 17,832 pounds of meat intended for the War Shipping Administration. Count III. Title 18 USCA, Sec. 88. Defendant did, on January 16, 1945, and thereafter, in San Francisco, Calif., conspire with divers persons to commit offenses against the United States in violation of Title 18 USCA, Sec. 80, and did various overt acts to effect the object of said conspiracy; and the defendant having been now asked whether

he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts Two and Three of the Indictment;

It Is Further Ordered that the sentence of imprisonment imposed on defendant on Count Three of the Indictment commence and run at the expiration of the sentence of imprisonment imposed on defendant on Count Two of the Indictment.

(Jury returned Verdict of Not Guilty as to Count One of the Indictment)

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

VALENTINE C. HAMMACK

Special Assistant to the At-
torney General.

(Signed) LOUIS E. GOODMAN

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Filed and Entered this 19th day of March, 1945.

(Signed) C. W. CALBREATH

Clerk.

By R. E. WOODWARD

Deputy Clerk.

Entered in Vol. 35 Judg. and Decrees at Page
432. [33]

District Court of the United States, Northern
District of California, Southern Division

No. 29193-S. Criminal Indictment in three counts
for violation of Title 18 U.S.C.A. Sections 80
and 88.

UNITED STATES

v.

GEORGE PATRON

JUDGMENT AND COMMITMENT

On this 19th day of March, 1945, came the United States Attorney, and the defendant George Patron appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offenses charged in the 2nd & 3 Cts. of Ind. in the above-entitled cause, to wit: Viol. 18 USCA Sec. 80. Count II. Defendant did, on January 23, 1945, in Oakland, Calif., conceal a material fact in a matter within the jurisdiction of the War Shipping Administration, to-wit: diversion for his

own use, of 17,832 pounds of meat intended for the War Shipping Administration. Count III. 18 USCA Sec. 88. Defendant did, on January 16, 1945, and thereafter, in San Francisco, Calif., conspire with divers persons to commit offenses against the United States in violation of Title 18 USCA, Section 80, and did various overt acts to effect the object of said conspiracy; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts Two and Three of the Indictment;

It Is Further Ordered that the sentence of imprisonment imposed on defendant on Count Three of the Indictment commence and run at the expiration of the sentence of imprisonment imposed on defendant on Count Two of the Indictment.

(Jury returned Verdict of Not Guilty as to Count One of the Indictment.)

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

VALENTINE C. HAMMACK

Special Assistant to the At-
torney General

(Signed) LOUIS E. GOODMAN

United States District Judge.

The Court recommends commitment to a U. S.
Penitentiary.

Filed and Entered this 19th day of March, 1945.

(Signed) C. W. CALBREATH

Clerk.

By R. E. WOODWARD

Deputy Clerk.

Entered in Vol. 35 Judg. and Decrees at Page
433. [34]

District Court of the United States, Northern
District of California, Southern Division

No. 29193-S. Criminal Indictment in three counts
for violation of Title 18 U.S.C.A. Sections 80
and 88.

UNITED STATES

v.

JULIO RODRIGUEZ

JUDGMENT AND COMMITMENT

On this 19th day of March, 1945, came the United
States Attorney, and the defendant Julio Rodriguez
appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to-wit:

Violation of Title 18 USCA, Sec. 80. Count I. Defendant did, on January 23, 1945, in Oakland, California, cause to be made to the War Shipping Administration, a false and fraudulent statement concerning the receipt of certain meat ordered for the use of said War Shipping Administration. Count II. Title 18 USCA, Sec. 80. Defendant did, at said time and place, conceal a material fact in a manner within the jurisdiction of the War Shipping Administration, to-wit: diversion for his own use of 17,832 pounds of meat intended for the War Shipping Administration. Count III. Title 18 USCA, Sec. 88. Defendant did, on January 16, 1945, and thereafter, in San Francisco, California, conspire with divers persons to commit offenses against the United States in violation of Title 18 USCA, Section 80, and did various overt acts to effect the object of said conspiracy; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years on each of Counts One, Two and Three of the Indictment;

It Is Further Ordered that the sentences of imprisonment imposed on defendant, in this case, on Counts One and Two of the Indictment commence and run concurrently, and that the sentence of imprisonment imposed on defendant on Count Three of the Indictment commence and run at the expiration of the sentences of imprisonment imposed on defendant on Counts One and Two of the Indictment.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

VALENTINE C. HAMMACK

Special Assistant to the At-
torney General

(Signed) LOUIS E. GOODMAN

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Filed and Entered this 19th day of March, 1945.

(Signed) C. W. CALBREATH

Clerk.

By R. E. WOODWARD

Deputy Clerk.

Entered in Vol. 35 Judg. and Decrees at Page
434. [35]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 29193-G

THE UNITED STATES OF AMERICA

vs.

FERNAND CHEVILLARD and GEORGE
PATRON, et al.,

Defendants.

MOTIONS IN ARREST OF JUDGMENT

And now, after verdict against each of the above named defendants—Fernand Chevillard and George Patron—and before sentence, comes each of the said defendants in his own proper person, by his attorney Leo R. Friedman, and, each for himself and not one for the other, moves the Court here to arrest judgment herein on the offense set forth in Count Two of the Indictment and the verdict finding him guilty on said Count Two and not to pronounce judgment thereon for the following reasons, to-wit:

1. That the second count of said indictment does not state facts sufficient to constitute a public offense under the laws of the United States against said defendant.

2. That it appears from the record that judgment, if made and rendered and entered, would be unlawful.

3. That the second count of the indictment is

not sufficient in form or substance to enable this defendant or either of said defendants to plead the judgment in bar of another [36] prosecution for the same offense.

Wherefore, because of which said errors in the record here no lawful judgment can be rendered by the Court, each of said defendants prays that this Honorable Court arrest and withhold the judgment herein on said second count of the indictment and that the verdict of guilty on said second count be vacated and set aside and declared null and void.

Dated: March 19, 1945.

LEO R. FRIEDMAN

Attorney for defendant Chevillard and Patron

[Endorsed]: Filed Mar. 19, 1945. [37]

[Title of District Court and Cause.]

MOTIONS FOR NEW TRIALS

Comes now Fernand Chevillard and George Patron, two of the defendants above named, by Leo R. Friedman their attorney, and, each for himself and not one for the other, moves the court to set aside the verdicts finding him guilty on counts 2 and 3 of the indictment and to grant him a new trial on each of said counts, and as reasons therefore specifies the following:

1. That the court erred in denying his motion for a Bill of Particulars in all respects.

2. That the verdict of guilty on count 2 is contrary to the law.

3. That the verdict of guilty on count 3 is contrary to the law.

4. That the verdict of guilty on count 2 is not supported by the evidence in the case.

5. That the verdict of guilty on count three is not supported by the evidence in the case. [38]

6. That the verdict of guilty on count three is not supported by the evidence in the case.

7. That the court upon the trial of the case admitted incompetent evidence, offered by the United States in support of count two.

8. That the court upon the trial of the case admitted incompetent evidence offered by the United States in support of count three.

9. That the court upon the trial of the case excluded competent evidence offered by defendant in defense of count two of the indictment.

10. That the court upon the trial of the case excluded competent evidence offered by defendant in defense of count three of the indictment.

11. That the court improperly curtailed the cross examination of the witness Barral.

12. That the court improperly instructed the jury to the substantial prejudice of the defendant.

13. That the court, refused, to the substantial prejudice of defendant, to give correct instructions on the law pertaining to count two, as tendered and requested by defendant.

14. That the court refused, to the substantial prejudice of defendant, to give correct instructions on the law pertaining to count three, as tendered and requested by defendant.

15. That the court erred in refusing to direct a verdict of "Not Guilty" at the close of all the evidence on count two.

16. That the court erred in refusing to direct a verdict of "Not Guilty" on count three, at the close of all the evidence.

Dated: March 19, 1945.

LEO R. FRIEDMAN,
Attorney for Defendants
Chevallard and Patron.

[Endorsed]: Filed Mar. 19, 1945. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Fernand Chevillard, 520 Cherry Ave., San Bruno, California.

Name and address of appellant's attorney: Leo R. Friedman, 935 Russ Building, San Francisco.

Offense: Violating Title 18 U. S. C. A. Sec. 80 (using trick and device to conceal material fact from War Shipping Administration). Violating Title 18 U. S. C. A. Sec. 88. (Conspiracy to defraud United States.

Date of judgment: March 19, 1945.

Brief description of judgment or sentence: Count

2: Sentenced to imprisonment in prison for 2 years, and fine of \$. Count 3; Sentenced to imprisonment in prison for 2 years and fine of \$. Sentences consecutive.

Name of prison where now confined, if not on bail:

I, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgments above mentioned on the grounds set forth below.

FERNAND CHEVILLARD,
Appellant.

Dated: March 19, 1945. [40]

GROUND OF APPEAL

1. The court erred in overruling the demurrer to the indictment, and to each count thereof.

2. That count 2 of the indictment does not state an offense against the laws of the United States as to said defendant.

3. That the court erred in denying defendant's motion for a Bill of Particulars.

4. Insufficiency of the evidence to support the verdict and/or judgment on count 2 of the indictment.

5. That count 3 of the indictment does not state an offense against the laws of the United States as to said defendant.

6. Insufficiency of the evidence to support the verdict and/or judgment on count 3 of the indictment.

7. The trial court admitted incompetent evidence against defendant offered by the United States.

8. The trial court excluded competent evidence offered by the defendant.

9. The trial court erroneously instructed the jury on questions of law relating to each of the counts on which defendant was convicted.

10. The trial court erred in refusing to give defendant's requested instructions numbered: 3, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 19, 22, 23, 31, 33, 34, 35, and 37.

11. The trial court erred in its instructions to the jury on (a) reasonable doubt (b) circumstantial evidence, (c) definition of a principal in crime, (d) what constitutes an aider and abettor, and (e) the third count of the indictment as charging a conspiracy to do more than defraud the United States.

12. The trial court erred in denying defendants two motions for a directed verdict on count 2 and count 3 of the indictment. [41]

13. The court erred in limiting the cross examination of the witness Barral.

14. The court erred in denying the motion in arrest of judgment as to count 2 of the indictment.

15. The verdicts on counts 1 and 2 are inconsistent.

[Endorsed]: Filed Mar. 19, 1945. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Goerge Patron,
1326 Powell Street, San Francisco, California.

Name and address of appellant's attorney: Leo R.

Friedman, 935 Russ Buliding, San Francisco, California.

Offense: Violating Title 18 U. S. C. A. Sec. 80 (using trick and device to conceal material fact from War Shipping Administration.) Violating Title 18 U. S. C. A. Sec. 88 (Conspiracy to defraud United States.)

Date of judgment: March 19, 1945.

Brief description of judgment and sentence: Count 2: Sentenced to imprisonment in prison for 2 years and fine of \$. Count 3: Sentenced to imprisonment in prison for 2 years and fine of \$. Sentences consecutive.

Name of prison where now confined, if not on bail.

I, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgments above mentioned on the grounds set forth below.

GEORGE PATRON,
Appellant.

Dated: March 19, 1945. [43]

GROUNDS OF APPEAL

1. The court erred in overruling the demurrer to the indictment and to count 2 and count 3 thereof.

2. Count 2 of the indictment does not state an offense against the laws of the United States as to appellant.

3. Count 3 of the indictment does not state an offense against the laws of the United States as to appellant.

4. The court erred in denying appellant's motion for a Bill of Particulars.

5. Insufficiency of the evidence to support the verdict and/or judgment on count of the indictment.

6. Insufficiency of the evidence to support the verdict and/or judgment on count 2 of the indictment.

7. The court admitted incompetent evidence against defendant as offered by the United States.

8. The court excluded competent evidence offered by appellant.

9. The court erroneously instructed the jury on questions of law relating to count 2 and count 3 of the indictment.

10. The court erred in refusing to give appellant's requested instructions 3, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 19, 22, 24, 31, 33, 34, 35 and 37.

11. The court erroneously instructed the jury on (a) reasonable doubt, (b) circumstantial evidence, (c) definition of a principal in crime, (d) what constitutes one an aider and abettor, (e) that the third count of the indictment charged more than a conspiracy to defraud the United States.

12. The court erred in denying appellant's motions for directed verdicts of not guilty on counts 2 and 3 of the indictment.

13. The court erred in limiting the cross examination of the witness Barral.

14. The court erred in denying the motion in arrest of judgment as to count 2 of the indictment.

15. The verdicts on counts 1 and 2 are inconsistent.

[Endorsed: Filed Mar. 19, 1945. [44]]

[Title of Court and Cause.]

NOTICE OF APPEAL

To the clerk of the above entitled court:

1. Name and address of appellant: Julio Rodriguez c/o United Fruit Company, San Francisco, California.

2. Names and address of appellant's attorneys: Herbert Resner and George R. Anderson, 544 Market Street, San Francisco, California.

3. Offense:

First Count: Title 18, U. S. C. A., Sec. 80—Charge that appellant did make a false and fraudulent statement within the jurisdiction of the War Shipping Administration with the intention to defraud the government of the United States.

Second Count: Title 18, U. S. C. A., Sec. 80—Appellant was charged with covering up and concealing by a trick, scheme and device a material fact within the jurisdiction of the War Shipping Administration of the United States with the intention to defraud the government of the United States.

Third Count: Title 18, U. S. C. A., Sec. 88—Appellant was charged with a conspiracy to perpetrate the offenses described in Counts I and II.

4. Date of Judgment: March 19th, 1945.

5. Description of judgment or sentence:

First Count: Sentenced to prison term of 2 years.

Second Count: Sentenced to prison term of 2 years concurrent with First Count.

Third Count: Sentenced to prison term of 2 years consecutive to terms of First and Second Counts.

6. Prison where appellant now confined: County Jail, City and County of San Francisco, San Francisco, California.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment above mentioned, and the whole thereof, and from [45] the orders denying my motions in arrest of judgment and for a new trial, and the whole thereof, said judgment and orders being made and entered on March 19th, 1945, this appeal being based upon the grounds set forth below:

Dated at San Francisco, California, March 23rd, 1945.

JULIO RODRIGUEZ,

Appellant.

GROUNDS OF APPEAL

1. The verdict of guilty and judgment are contrary to the evidence.
2. The evidence is insufficient to support the verdict of guilty and the judgment.
3. The trial Court erred in denying various instructions requested by appellant.
4. The verdict and judgment are contrary to law.
5. The trial Court erred in denying appellant's motions for a directed verdict of acquittal, said motion being made and the grounds specified on the conclusion of the government's case, and being renewed on the close of all the evidence in the case.
6. The trial Court erred in its rulings in admitting into evidence various oral and documentary evi-

dence over the objections of appellant, which objections were good and substantial in point of law.

7. The trial Court erred in denying appellant's motions in arrest of judgment and for a new trial, and to dismiss the first and second and third counts of the indictment.

Dated at San Francisco, California, March 23rd, 1945.

ANDERSEN & RESNER,
HERBERT RESNER,
Attorneys for Appellant. [46]

Receipt of a copy of the within Notice of Appeal and Grounds in support thereof is hereby admitted this 24th day of March, 1945.

FRANK J. HENNESSY,
United States District
Attorney.

By JAMES E. BURNS,
Special Attorney
War Fraud Section.

[Endorsed]: Filed Mar. 24, 1945. [47]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 2nd day of April, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDERED BILL OF EXCEPTIONS BE FILED
IN 40 DAYS WITH 15 DAYS TO ANSWER

This case came on regularly this day for hearing as to record on appeal. Valentine C. Hammack, Esq., Special Assistant Attorney General, was present on behalf of the United States. Leo Friedman, Esq., appeared as attorney for defendants Fernand Chevillard and George Patron; and H. Resner, Esq., appeared for defendant Julio Rodriguez. After hearing the attorneys, it is ordered that the Bill of Exceptions be filed in 40 days, with 15 days to answer. [48]

In the Southern Division of the United States District Court, for the Northern District of California.

No. 29193-G

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

FERNAND CHEVILLARD and GEORGE
PATRON,

Defendants and Appellants.

ASSIGNMENT OF ERRORS OF APPELLANTS
CHEVILLARD AND PATRON

Fernand Chevillard and George Patron, defendants and appellants in the above cause, having each appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered in the above cause against each of them and having duly given Notice of Appeal as provided by law, now, each for himself and jointly and severally, make and file the following Assignment of Errors herein, upon which each of said defendants will apply for a reversal of said judgment and sentence upon appeal, and each of said defendants says that in the record and proceedings in the above entitled cause there is manifest error in the following particulars, to wit:

1.

That the above entitled court erred in its order overruling the demurrers of each of said defendants

to each count of the indictment herein, to which ruling and order each of said [49] defendants duly excepted. (Exception No. 1.)

2.

The court erred in denying the motion of each defendant for a directed verdict of not guilty upon Counts Two and Three of the indictment, which said motions were made at the close of the government's case, each motion being made upon the ground that the evidence introduced by the Government was and is insufficient to support either a verdict or a judgment of guilty as to each defendant upon each of said counts and that no offense sought to be charged in each of said counts of the indictment had been proved by the Government as against the defendant Chevillard or as against the defendant Patron. The court denied each of said motions for directed verdicts to which ruling of the court, each of said defendants duly excepted. (Exception No. 28.)

3.

The court erred in denying the motion of each defendant for a directed verdict of not guilty upon Counts Two and Three of the indictment, which motion was made at the close of all the testimony and evidence in the case. Each of said motions on behalf of each defendant was made upon the ground that all of the evidence introduced in the case was and is insufficient to support either a verdict or judgment of guilty as to each count and that no offense sought to be charged in each count of the indictment had been proved by the evidence as against the de-

fendant Patron or against the defendant Chevillard. The Court denied each of said motions for directed verdicts to which ruling of the court each of said defendants excepted. (Exception No. 29.)

4.

That the evidence in the case was and is insufficient to establish the offense set forth in Count Two of the indictment as against the defendant Chevillard or against the defendant [50] Patron.

5.

That the evidence introduced in the case was and is insufficient to establish the offense set forth in Count Three of the indictment as against the defendant Chevillard or against the defendant Patron.

6.

That the court erred in refusing, on motion and request of defendants, to direct Government witness, Elroy Hinman, during the course of his cross examination, to produce the books of the Ed Heuck Company, which contained a record of what was billed against the United Fruit Company, War Shipping Administration, as more fully appears as follows: The witness had testified that he was manager of the Ed Heuck Company and had supervision of the sending of the meat to the Sea Perch and that such meat was 17,000 pounds less than the amount shown in the receipt marked as Government's Exhibit 5; that the books of said company contained a record of what was billed against the United Fruit Company, War Shipping Administration, together with

the quantity and amount of deliveries that the bill represents; that such books were under his general supervision.

Mr. Friedman: Might I ask that the witness be instructed to produce the books?

The Court: I do not know that there is any reason for the granting of that.

Mr. Hammack: To which I object, as to what the books show in regard to billing; it would be improper cross examination.

The Court: Unless some more adequate reason is shown I will deny it.

Mr. Friedman: I will wind this up by stating that while this witness ordered 66,000 pounds of meat to be placed upon [51] the various trucks and ordered 17,000 pounds, approximately, placed in one particular truck, and that this witness said as far as he knows the only amount of meat that was made up and delivered to the Sea Perch that day was the 66,000 pounds less the 17,000 pounds, that even for the purpose of testing this witness' recollection or even impeaching his testimony I have a right to see the books that are under his supervision.

The Court: I do not think there is any materiality to your point. I will sustain the objection.

Mr. Friedman: Note an exception. (Exception No. 5).

7.

That the court erred in limiting the cross examination of the witness Dean Heuck, produced by the Government, as more fully appears as follows. The witness had testified that he was a general partner

of the company that supplied the meat to the Sea Perch.

Exception No. 6

Q. I see. Who did you bill for this meat?

Mr. Hammack: I object to that, may it please Your Honor, on the ground it is improper cross examination.

The Court: I will sustain the objection. An exception may be noted on behalf of all defendants.

Exception No. 7

Mr. Friedman: Q. Was your company ever paid for the meat?

Mr. Hammack: Same objection, your Honor.

The Court: Same ruling, same exception.

8.

The court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, which more fully appears as follows: [52]

Exception No. 9

Q. What was it you pleaded guilty to?

Mr. Hammack: I object, your Honor. The indictment speaks for itself.

Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

Mr. Hammack: It is not a question of what he thought he pleaded guilty.

The Court: I sustain the objection. I thing that is a legal question.

Mr. Friedman: Exception, your Honor.

The Court: Exception noted.

9.

That the court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, as more fully appears as follows:

Exception No. 10.

Q. You pleaded guilty, but you don't know how many charges you pleaded guilty to, is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross examination, immaterial, irrelevant, and incompetent.

The Court: I will sustain the objection.

Mr. Friedman: Might I call the Court's attention to this?

The Court: I do not think it is necessary to argue this. You have made your objection and I have ruled on it.

Mr. Friedman: May we have our exception.

The Court: Yes.

10.

The court erred in admitting in evidence, during the [53] direct examination of Dallas A. Johnson, a witness produced by the United States, the signed statement of the defendant Fernand Chevillard, as against the defendant Chevillard only, as more fully appears as follows:

Exception No. 11

Mr. Hammack: At this time we will offer this statement in evidence as against Mr. Chevillard only.

Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it?

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be inadmissible on one count and not admissible on the other.

The Court: All right.

(The statement of Fernand Chevillard was marked U. S. Exhibit 18.)

11.

That the court erred in refusing to grant the motion [54] of each defendant to strike out that portion of the testimony given by the witness Pierre Barral, which said testimony was in substance, that a day or two before the Sea Perch reached port on December 28, 1944, he had a conversation with the defendant Rodriguez, out of the presence of either Chevillard and Patron, in which conversation Rodriguez stated he had some meat on board the ship, about 20,000 pounds, that nobody knew about, that he, Rodriguez, asked the witness if there was any way they could sell the meat.

The motion to strike said testimony was made upon the ground that such testimony was not binding on either of the defendants in that it was an act, transaction and conversation occurring out of their presence and which they had never authorized or ratified and upon the further ground that it did not tend to prove any charge or element of any of the charges set forth in the indictment.

The court denied the motion to strike such testimony to which each defendant duly excepted. (Exception No. 15).

12.

That the court erred in refusing to grant the motion of each defendant to strike out certain portions of the testimony given by the witness Brandt-Nielsen as more fully appears as follows:

Exception No. 18

Mr. Friedman: Now, referring to the testimony of Brandt-Neilson, I move to strike out the portion

of Brandt-Neilson's testimony in which he testified that on or about January 22, in the room of Rodriguez on board the Sea Perch he had a conversation with Mr. Rodriguez in which Mr. Rodriguez discussed with him the question of economy and waste on ships, and that if stewards did not indulge in so much waste there would be a great deal of saving to the company in meat, and in which conversation he further stated that Mr. Rodriguez stated that [55] he had a large amount of meat and had gone around to see the manager of a meat company, and that the meat company had ought to pay him, or that he could sell the manager of the meat company, and then your Honor will recall Mr. Brandt-Neilson testified there was some mention of a hundred dollars, but that he could not make out what it was all about; he did not know whether he was to get it or somebody else, or who was either to pay it or receive it. I move to strike out the testimony on the ground it certainly has nothing to do with the defendants in this case and does not tend to establish any essential element of any count of this indictment, and it is certainly not binding on either of these defendants; that was a conversation occurring out of their presence, and there was no evidence that they had any knowledge thereof, that they ever authorized or sanctioned the making of such statements by Mr. Rodriguez, or that they were subsequently apprised thereof, or it was ratified or conformed by them in any way.

13.

That the court erred in refusing to strike out certain portions of the testimony of the witness Ham-

burg, when called on behalf of the United States as more fully appears as follows:

Exception No. 19

Mr. Friedman: I move to strike out the testimony of Mr. Hamburg, who testified, as I recall it, that he was the chief checker, and that he was present and talked to Mr. Rodriguez, in which conversation Mr. Rodriguez signed a sheet showing that a certain amount of meat had been delivered to the Sea Perch. You will recall on January 23rd he testified, Mr. Hamburg did, that he prepared that tag for signature, and that he requested Mr. Rodriguez to sign it, and that Rodriguez signed it upon his statement that there was that amount of meat that had been delivered. Certainly that is not an act in furtherance of the [56] conspiracy, and it certainly is not an act that is involved in Count 1 or Count 2 of the indictment, because under this witness' own testimony, Mr. Hamburg's own testimony, Rodriguez signed upon his representation this tag for the United Fruit Company, and he, as the Government contends, is the agent and the alter ego of the War Shipping Administration, and procured the signing of this tag by Mr. Rodriguez. It is certainly not a false statement as outlined by Count 1 of the indictment, and it is certainly not a trick or scheme to cover up that fact. I can conceive that if this tag had been given to the Chief Clerk and prepared by Rodriguez and signed by him and given to the Chief Clerk, that there probably would be some basis for the assumption that Rodriguez knew it was false and was filing

it for the purpose of concealing facts from the War Shipping Administration, but such is not the evidence in the case. This is the Government's own evidence, that is not ours, and the Government's own proof has established that the tag was not prepared by Rodriguez upon the representation of an agent of the War Shipping Administration that that amount of meat had been placed on the ship, and that it was a routine matter, that these things were done in that way at all times. So I move to strike out the testimony and the tag (Exhibit 9) signed by Rodriguez on the ground that it does not prove or tend to prove the elements of the offense set forth in Count 1 of the indictment; that it does not prove or tend to prove the elements of the offense as set forth in Count 2, and does not prove or tend to prove the offense set forth in the third count of the indictment; and upon the further ground that it was a transaction outside of the presence of these defendants, which they had no knowledge of prior to or subsequent to the time of its commission, and they never authorized, ratified or confirmed or had any knowledge thereof.

I will submit that motion. [57]

The Court: The motion will be denied and an exception noted.

14.

That the court erred in refusing to strike out Government's Exhibit No. 18, the statement signed by the defendant Chevillard, which said motion was made upon the ground that the manner in which the statement was procured was a denial of due process

of law and in violation of the Fifth Amendment to the Constitution of the United States, which motion was denied by the court and to which the defendant Chevillard duly noted an exception. (Exception No. 21).

15.

That the court erred in refusing to strike out Government's Exhibit No. 5, a delivery tag prepared by the Ed Heuck Company and signed by the defendant Brandt-Neilsen which tag showed the delivery by the Ed Heuck Company to the S. S. Sea Perch of 64,793 pounds of meat. Said motion was made on the ground that such document was not binding on either of the defendants, that they had no knowledge thereof, had never authorized or procured the signing of any such tag by a representative of the War Shipping Administration, or United Fruit Company and that neither of said defendants had ratified or confirmed that fact. The court denied such motion, to which each defendant duly excepted. (Exception No. 23).

16.

That the court erred in denying the motion of each defendant to strike out Government's Exhibit No. 9, a delivery tag similar to Government's Exhibit No. 5, but which was signed by the defendant Rodriguez. The court denied said motions to which ruling each of said defendants noted an exception.

17.

That the court erred in instructing the jury as follows: [58]

“I will say, in the first place, there are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such circumstantial evidence may consist of statements by the defendant, plans laid for the commission of the crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

“If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

“In cases of circumstantial evidence facts should be proven which are not only consistent with the guilt of the defendant but inconsistent with any other reasonable hypothesis.”

Each defendant objected and noted an exception to the giving of said instruction upon the ground that it did not contain the element that if the circumstantial evidence was equally consistent with the hypothesis of innocence as that of guilt, the finding of the jury must be in favor of the defendant. (Exception No. 30). [59]

18.

That the court erred in instructing the jury as follows:

“Whoever directly commits any act constituting an offense defined in any law of the United States, or whoever aids, abets, counsels, induces or procures its commission, is a principal and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of the law is a principal, as is also one who either aids, abets, counsels, induces, or procures the doing of that act.

“The word “aid” means to help, to support, or to assist.

“The word “abet” means to instigate or encourage by aid or countenance, or to contribute.

“It is essential to the guilt of a person charged with aiding and abetting the commission of the crime that such person’s acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

“A person who knowingly renders assistance, cooperation, and encouragement in the commission of an offense is one who aids and abets in the commission.”

Each defendant objected and noted an exception to the giving of the foregoing portion of the charge upon the ground that it did not contain the element that the person accused of aiding and abetting another in the commission of a crime, must have a criminal intent and that such act of aiding and abetting must be done with the intent of having the ultimate act actually done and accomplished. (Exception No. 31).

19.

That the court erred in instructing the jury as follows:

“So that in the third count of the indictment there are [60] three elements alleged, namely, confederating and conspiring together to cause the presenting of a false claim and securing payment from the United States therefor, and a conspiracy to commit the acts specifically charged in the first and second counts of the indictment.”

Each defendant objected and noted an exception to the giving of the foregoing charge as more fully appears as follows:

Exception No. 32

I likewise desire to note an exception to your Honor's instruction to the jury as to the elements involved in the third count of the indictment. Your Honor instructed the jury that the third count of the indictment involved a conspiracy to commit several acts, to-wit, to defraud the United States, to make a false representation to the War Shipping Administration, to resort to a trick, scheme or device for the purpose of concealing a material fact from the War

Shipping Board, etc. The indictment, as I read the third count, states specifically that the defendants are charged with the offenses, to-wit, to defraud the United States in violation of title 18, USCA, section 80, and that the balance of the indictment simply alleges the manner and means in which they were to defraud the United States, and that the portion that relates to the false claim and resorting to the trick and device of getting a receipt to be signed are not the things that they are charged with conspiring, but they are merely stated as the means whereby the sole object of the conspiracy, to-wit, to defraud the United States, was accomplished. As I stated, I desire to note an exception.

20.

That the court erred in refusing to give defendants' requested instruction No. 3, to which refusal each defendant duly excepted. Said instruction No. 3 reads as follows: [61]

Requested Instruction No. 3

Two of the defendants in this case, Pierre Barral and Lucien L. De Angury have taken the stand as witnesses in behalf of the Government. Each of these witnesses has pleaded guilty to the charges contained in the indictment. In considering the credibility to be given to each of these witnesses you have a right to take into consideration the fact that each of these men has pleaded guilty and is awaiting the pronouncement of judgment. You have a right to consider these facts in determining the bias that each of these witnesses may have against their co-defendants and in determining whether or not these

two men are testifying under the expectation of immunity or leniency as to the charges to which they have pleaded guilty. If you determine that either of these men are testifying in favor of the government due to any bias they may have against any other defendant in the case or under the expectation of any immunity or leniency, you have a right to consider such fact in determining the credibility of each such witness.

21.

That the court erred in refusing to give defendants' requested instruction No. 11, to which refusal each defendant noted an exception, which requested instruction reads as follows:

Requested Instruction No. 11

By the second count of the indictment on file herein the defendants are charged with knowingly, wilfully, unlawfully and feloniously, covering up and concealing by a trick, scheme and device a material fact within the jurisdiction of the War Shipping Administration and that the material facts so covered and concealed by such trick and scheme and device are as follows: that the defendants knew that the War Shipping Administration had ordered from the Ed Heuck Company approximately 64,793 pounds of [62] meat, to be delivered by the said Ed Heuck Company to the said War Shipping Administration; that possessing such knowledge the defendants diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their

own use and with the intent to defraud the said War Shipping Administration, the defendants covered up and concealed the fact of said diversion and conversion of approximately 17,832 pounds of meat by the trick, scheme and device of signing and causing to be signed and issuing and causing to be issued by the said War Shipping Administration a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

Before you can find either the defendant Chevillard or the defendant Patron guilty on this second count of the indictment you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that such defendant did in fact sign or caused to be signed or issue or cause to be issued by the War Shipping Administration said receipt for approximately 64,793 pounds of meat. If the evidence established that the defendant Chevillard did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt, you must return a verdict finding the defendant Chevillard not guilty. If the evidence established that the defendant Patron did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt you must return a verdict finding the defendant Patron not guilty. If you have a reasonable doubt as to whether the defendant Chevillard or the defendant Patron signed or caused to be signed or was instrumental in having the War Shipping Administration issue or cause to be issued

such receipt, you must resolve such doubt in favor of such defendant and acquit him [63] on the second count of the indictment.

22.

That the court erred in refusing to give defendants' requested instructions No. 13 and No. 14, to which refusal each defendant duly excepted. That said requested instructions read as follows:

Requested Instruction No. 13

Before you can find the defendant Chevillard guilty on count two of the indictment you must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant Chevillard signed and caused to be signed, or was instrumental in having the War Shipping Administration issue or cause to be issued a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat. If the evidence established that some person other than the defendant Chevillard issued or caused to be issued said receipt or was instrumental in having the War Shipping Administration issue or cause to be issued said receipt, but that the defendant Chevillard had no knowledge thereof, and did not abet, counsel, command, induce or procure such other person to do such act, you must return a verdict herein finding the defendant Chevillard not guilty on count two of the indictment.

Requested Instruction No. 14

Before you can find the defendant Patron guilty on count two of the indictment you must be satisfied to a moral certainty and beyond a reasonable doubt

that the defendant Patron signed and caused to be signed, or was instrumental in having the War Shipping Administration issue or cause to be issued a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat. If the evidence established that some person other than the defendant Patron issued or caused to be issued said receipt or was instrumental in having the War Shipping Administration issue or cause to be issued said receipt [64] but that the defendant Patron had no knowledge thereof, and did not abet, counsel, command, induce or procure such other person to do such act, you must return a verdict herein finding the defendant Patron not guilty on count two of the indictment.

23.

That the court erred in refusing to give defendants' requested instruction No. 15 to which refusal each defendant duly excepted. Said requested instruction No. 15 reads as follows:

Requested Instruction No. 15

If you should find from the evidence that either the defendant Chevillard or the defendant Patron co-operated with some other defendant in this case for the purpose of finding a place to store approximately 17,000 pounds of meat that had been sent by the Ed Heuck Company to the War Shipping Administration and if you should also find that either of these defendants likewise co-operated with some other defendant for the purpose of moving a truck in which said 17,000 pounds of meat was being transported, these facts even of themselves will not be

sufficient in justifying you to return a verdict finding either Chevillard or Patron guilty of the offenses set forth in count one or count two of the indictment. Before either of these defendants can be found guilty on either count one or count two of the indictment the evidence must establish to a moral certainty and beyond a reasonable doubt that they had actual knowledge that the War Shipping Administration was going to be called upon to sign or caused to be signed or issue or caused to be issued the alleged receipt for approximately 64,793 pounds of meat. If the defendants Chevillard and Patron did not know of this fact and did not act by way of counsel, advice, assisting or instigating the signing and issuing of such receipt you must find the defendants Chevillard and Patron not guilty on counts one and two [65] of the indictment, no matter what else you may find the defendants did do relating to the matters and things set forth in the indictment.

24.

That the court erred in refusing to give defendants' requested instruction No. 37, to which refusal each defendant duly excepted. Said requested instruction 37 reads as follows:

Requested Instruction No. 37

When independent facts and circumstances are relied upon to establish by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and

beyond a reasonable doubt. If in the chain in the facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned.

Wherefore, for the many manifest errors committed by the court each defendant, through his attorney, prays that said sentences and judgments of conviction be reversed, and for such other and further relief as may seem meet and proper.

Dated: May 10, 1945.

LEO R. FRIEDMAN,
Attorney for Defendants
Chevillard and Patron.

Copy of the foregoing Assignment of Errors received this 12th day of May, 1945.

VALENTINE C. HAMMACK,
(m.c.a.)

Special Assistant to the
Attorney General.

[Endorsed]: Filed March 12, 1945. [66]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please prepare transcript on appeal to include the following pleadings, papers, motions, proceedings and orders in the above entitled cause:

1. Indictment.
2. Demurrers of Chevillard and Patron to indictment.
3. Order overruling demurrers and exception thereto.
4. Minutes of the trial.
5. Verdicts of the jury.
6. Motion for new trial and order denying same.
7. Motion in Arrest of Judgment and Order denying same.
8. Sentence and judgment.
9. Notices of appeal.
10. Assignment of Errors.
11. Bill of Exceptions and Order settling same.
12. Order of April 2, 1945, extending time for preparing, lodging, amending and settling Bill of Exceptions.
13. This Praeceptum.

LEO R. FRIEDMAN,

Attorney for Defendants.

Copy of the foregoing Praeceptum received this 12th day of May, 1945.

VALENTINE C. HAMMACK,

(m.c.a.)

Special Assistant to the
Attorney General.

[Endorsed]: Filed May 12, 1945. [67]

At a Stated Term, to wit: The October Term 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the fifteenth day of May in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Francis A. Garrecht, Senior Circuit Judge, Presiding; Honorable Clifton Mathews, Circuit Judge; Honorable William Healy, Circuit Judge.

No. 29193-S

No. 11022

JULIO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**ORDER EXTENDING TIME TO SETTLE AND
FILE BILL OF EXCEPTIONS, AND TO
FILE ASSIGNMENTS OF ERROR.**

Upon consideration of the petition of appellant for an extension of time within which to file his bill of exceptions, and of the affidavit of Mr. Herbert Resner, counsel for appellant, in support thereof, and by direction of the Court,

It Is Ordered that the time within which appellant may have settled and filed his bill of exceptions,

and file his assignments of error be, and hereby is extended to and including June 30, 1945.

(Certification.)

[Endorsed]: Filed May 16, 1945. [68]

[Title of District Court and Cause.]

**BILL OF EXCEPTIONS OF APPELLANTS
CHEVILLARD AND PATRON**

Be it remembered that heretofore the Grand Jury of the United States, in and for the Northern District of California, Southern Division, did present and return into and before the above entitled court, its indictment against the above named defendants and Julio Rodriguez, Pierre Francoise Barral, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini.

Exception No. 1

That after the return of said indictment, as aforesaid, said defendant Chevillard and Patron duly and seasonably filed on February 8, 1945, their joint and several demurrer to said indictment and to each count thereof, and thereafter the above entitled court made its order overruling and disallowing said demurrer and the whole thereof, to which ruling [69] each of said defendants then and there duly excepted.

That thereafter each of said defendants named in said indictment was duly arraigned as shown in the record on file in the above cause and as so shown

by said record the defendants Chevillard, Patron, Rodriguez, Jacky and Vincenzini did enter their pleas of not guilty to each indictment and each and every count thereof, and the defendants Barral and De Angury did enter their pleas of guilty to said indictment and each count thereof.

And be it further remembered that the above entitled cause being at issue the same came on regularly for trial before the Honorable Louis E. Goodman, United States District Judge, on March 6, 1945, as to all of said defendants who had entered pleas of not guilty to said indictment. Whereupon a jury was duly empanelled and sworn to try the cause. The United States being represented by Valentine C. Hammack, Esq., Special Assistant to the United States Attorney General, the defendants Chevillard and Patron being personally present and represented by Leo R. Friedman, Esq., the defendants Julio Rodriguez being personally present and represented by Herbert Resner, Esq., the defendant Vincenzini being personally present and represented by A. J. Zirpoli, Esq., and the defendant Jacky being personally present and represented by Sol A. Abrams, Esq., and E. C. Mahoney, Esq.

Thereupon Valentine C. Hammack, Esq., made an opening statement to the jury as to the matters the plaintiff expected to prove.

Thereupon the United States, to maintain the issues on its part to be maintained, called the following witnesses.

STIPULATION

It was stipulated between the plaintiff and said defendants on trial that a certain contract then offered in evidence by the United States was executed by the parties whose [70] names appeared upon said contract.

Exception No. 2

Appellants Chevillard and Patron objected to the admission in evidence of said contract on the ground that it was *res inter alias atea* in that it involved some alleged contractual obligation between two strangers to the matter on trial and involved a transaction with which the defendants Chevillard and Patron were not a party and therefore were not bound by it and that said contract did not constitute competent evidence against either Chevillard or Patron. The court overruled said objection and an exception was noted by each of said defendants.

Said contract was admitted in evidence as U. S. Exhibit No. 1.

Testimony of George Halstead for the United States.

GEORGE HALSTEAD

produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I live at 645 Faxon Avenue, San Francisco. I am port steward for the United Fruit Company, which operates the steamship *Sea Perch*. The *Sea Perch* was in commission in January, 1945, and was here in port in San Francisco in September of 1944. It returned to San Francisco about December 28, 1944. Julio Rodriguez was the chief steward on the *Sea Perch*. (Here witness identifies defendant Julio Rodriguez.) Pierre Barral was the assistant steward on the *Sea Perch*. The duties of the port steward are the employment and supervision of the steward's department, the cook, messroom, waiters and everyone else in the catering department, and also the supervision of all stores, food stores, supervision and working of stores aboard any ship. [71] Upon the return of the ship to port it is the duty of the ship's steward to return an inventory showing what stores he has on hand at the completion of his trip. Upon the completion of the *Sea Perch's* trip, upon its arrival in San Francisco, upon December 28, 1944, the chief steward submitted an inventory of the stores that he had left on hand. I personally went aboard the ship but I did not check the inventory. Upon receiving the inventory from the chief steward I conferred with him regarding his order for the coming voyage, what requirements he needed for the coming voyage and then I go through his ship for cleanliness and condition of existing stores remaining on board the

ship to see if they are in proper condition to go out again. In ordering stores for a voyage the requisition is based upon the number of persons who may be on that particular voyage and the length of the voyage. In making a requisition for meat there is a poundage allotment to be used per number of people and per number of days.

The document you show me, consisting of two sheets, is the steward's department account for stores of the United Fruit Company and on it is the bookkeeping of the stores on hand for the last voyage and what is purchased or the total of stores on board—the consumption for that voyage and what he has on hand and in the last item is a requisition for the next voyage. These two sheets apply to meat and dairy products. It is the chief steward's duty to make up these sheets. It is made up while the chief is at sea. I could not say whether chief steward Rodriguez did it, but it is his duty to make it out. I first saw this inventory on board the ship. It was handed to me with the ship's papers when the ship arrived in port. It was for our records. The chief steward handed over this inventory. [72]

Referring to the inventory, the word "unit" on it means what is defined under the heading of that column, for instance pounds. In this particular column where it says "units on hand when the voyage ended," that is what the ship had on hand coming in. The figures show what was on hand on the ship at the time the ship came in and on the other part of that paper is what the steward

estimates what he will need for the next voyage.

Upon receipt of this inventory pertaining to meat I passed it to the purchasing department for purchase, to make up a purchase order more or less upon the lines indicated in this order.

(Thereupon the United States offered the two sheets testified to by the witness in evidence, and upon objection being made said sheets were offered and received in evidence as U. S. Exhibit No. 2 only against the defendant Rodriguez and were marked as Exhibits for Identification as against all other defendants on trial.)

I had a conversation with the defendant Rodriguez, prior to January 23, in connection with the meat to be delivered to the Sea Perch. The conversation took place in my office and there were present Julio Rodriguez and Pierre Barral and my secretary. The conversation took place about three days previous to storing that particular ship—about the 20th of January.

Exception No. 3

“Q. What conversation did you have at that time and what was said and by whom?

“Mr. Friedman: Now, if your Honor please, I will object on behalf of the defendants Chevillard and Patron that it calls for a conversation out of the presence of either or both of them, nothing to show that they had any knowledge thereof, or authorized or participated therein, and it is not binding on them.

“The Court: I take it that you are going to connect up all of these matters?

“Mr. Hammack: Yes. [73]

“The Court: I presume it is in my discretion as to whether I rule the testimony should be limited to one defendant and then by motion later on allowed as to all defendants, or whether or not it should be allowed subject to a motion to strike, and I think it will be in the interest of orderly procedure to let it in, and I will overrule the objection, and counsel may make a motion to strike it later on, and if the proper foundation has not been laid it may be stricken out. The record will show that each of the counsel’s objections except counsel for the defendants who are named as participating in the conversation have been overruled subject to a motion to strike if it is not connected up.”

(Witness continuing): The main things that were said was—we set a date for the storing of the ship. I think the date set was the 22nd, 23rd and 24th. We set three days for loading that ship. The first day we were going to take what we term dry stores, groceries, etc. The second day we were going to take the meat and perishable items and the third day close out the short items. I definitely set the date that the meat would be delivered at the ship. The meat was to be delivered on the 23rd or the 24th, one of those two dates.

Cross Examination

(By Mr. Friedman)

I did not check the stores on the Sea Perch when she came into port. I received this inventory and requisition as part of the ship's papers. I did not have anyone check the stores on the Sea Perch. I took Mr. Rodriguez's papers as being a correct check of the stores that had not been used on that voyage.

(By Mr. Zirpoli)

The documents that were placed in evidence were offered to me upon the date of the ship's arrival in San Francisco, about December 28. The conversations that I have just mentioned about the date set for storing the ship was January 20.

(By Mr. Resner)

I have been associated with the United Fruit Company [74] since 1924. I have known the defendant Rodriguez since 1930—the past fourteen years. He has had a good character from what I have known of him. My first acquaintance was back around 1930 when we made various trips together on the same vessel. I at that time was his superior on the ship. I would say that was about six months. In the interim I have seen him as various times when he shipped, after I was transferred to shore duty and his ship entered the port that he was in, which was sometimes on the East Coast and later on the West Coast and meeting

that ship in my capacity as port steward and checking that ship and paper work for that department. When I checked this ship in December, 1944, I did so in the same way that I would check the ships during all of the years that I had shore duty and he was chief steward aboard different vessels. In December, 1944, when the Sea Perch returned she docked in San Francisco. It was aboard ship that Mr. Rodriguez gave me this inventory. Part of that inventory was taken when the vessel left. This voyage which ended in December, 1944, commenced on October 30, 1944. The vessel was gone in November and December. When the vessel departed on October 30, an inventory was prepared of what went aboard the vessel. The inventory in evidence is an inventory of what went aboard the vessel when she left in October. A copy of that went with the vessel. The items included what were already on the ship from the prior journey together with what I put aboard in October. When the vessel came back in December there is a column which indicates what was left aboard the ship. That column was filled in or supposed to be filled in by Rodriguez and handed to me. Column 1 indicates that there were certain supplies on the ship. That column is designated as "on hand at the end of the voyage." I went to the storeroom and took a general look to see the condition of the storeroom and condition of the [75] stores remaining aboard but I did not check what was remaining on the ship with the inventory. On various occasions I did take an inventory and I did not check it on

every item. On the check I made in December I looked to see whether the stores were fit for another voyage or whether they had become contaminated by weevils or other bugs aboard ship. If they were fit for human consumption. I found everything satisfactory. That is what I meant by condition of store.

I had this meeting with Mr. Rodriguez and Mr. Barral in my office about January 20, 1945, at which time I discussed with Rodriguez the date upon which I would load the vessel. That is one of our ordinary duties and an ordinary thing to do. There was nothing unusual about that meeting or in Mr. Rodriguez coming to my office to discuss the date on which we would load the vessel. He either came to my office or I went to the ship. Rodriguez was required to discuss that matter with me, the date for storing the vessel.

Testimony of Harold Marchall for the United States

HAROLD MARCHALL

called as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am assistant purchasing agent of the United Fruit Company. The Sea Perch is operated by the United Fruit Company. All of the invoices presented to the United Fruit Company are ren-

dered to the United States of America, War Shipping Administration, United Fruit Company General Agents. All purchase orders are to United States of America War Shipping Administration.

My duties as assistant purchasing agent are that I purchase all supplies for ships that are handled or allocated to our company. The procedure is that the requisition or [76] inventory is brought into the purchasing department from the steward's department and then we proceed with the purchase of all the necessary supplies that are required by the ship. We arrive at the amount to be purchased for the ship from the inventory. What that amount is on the ship's requisition that comes from the steward's department to us is the amount used. The chief steward gives the paper to the port steward and the port steward sends them on in an order. He looks them over and the amount that is on the right hand side of the requisition is the amount we send for the next voyage. Referring to Government's Exhibit in Evidence 2, that is a requisition of the Sea Perch that we handled and I made purchases from. It was an inventory showing the amount of supplies on hand, when the Sea Perch returned to San Francisco on December 28. The column out here on the right side of the sheet is the one from which I placed my purchase order. That column is headed "supplies for next voyage." Upon receipt of this inventory and requisition I placed an order for certain meat with the Ed Heuck Company. The document captioned "W. S. 18,841, United States of America War Shipping Adminis-

tration, United Fruit Company, General Agent'' is an order I issued to the Ed Heuck Company for meat for delivery to the Sea perch. When this order was sent to the supplier it did not have any lead pencil notations on it. When the Ed Heuck Company received this order, they at times could not supply a certain type or a certain grade of meat which we have to make specifications for and that is the reason for the pencil marks on it. They called up that they could not supply a certain order and ask our authority to substitute, which we did. (The order referred to by the witness was then offered and received in evidence as U. S. Exhibit 3 against the defendant Rodriguez and was marked for identification against the remaining defendants.) [77]

Cross Examination

(By Mr. Friedman)

After the inventory leaves the hands of the chief steward the port steward has the authority to change the amount of the requisition. The inventory is given to the port steward with this requisition of the amount he needs for the next voyage. After the port steward invoices these papers he sends them on to us. Whether he changes them or not I don't know. After the requisition leaves the hands of the chief steward the port steward determines how much is actually going to be purchased.

(By Mr. Resner)

Referring to Government's Exhibit 2 the word "unit" in the requisition for the next voyage indicates the amount of different products that will be ordered by me from the different companies and pursuant to that this order which is Exhibit No. 3 was filled out by me and sent to the Heuck Company. I examined the requisition carefully and placed the order. It is the port steward's job to deal with what is on hand on the vessel. We only take the amount which is required for the next voyage and purchase that amount. I have no authority with regard to any action with which is on the ship when it comes back.

I know Mr. Rodriguez by sight.

(By Mr. Friedman)

As purchasing agent of the company it is not part of my duty to pay bills. That is the accounting end of the company. The bills are paid by the War Shipping Administration. I don't know whether the company I work for, first pay the bills and then the War Shipping Administration pays back that amount to them. I sign the orders I issue under the name of United States of America War Shipping Administration and I am instructed to have [78] the invoice rendered in the name of the War Shipping Administration. I do not know who actually pays the people who furnished these supplies, whether it is the company I work for or the War Shipping Administration.

Testimony of Elroy Hinman for the United States

ELROY HINMAN

produced as a witness on behalf of the United States having been first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am manager of the Ed Heuck Wholesale Butcher Company, located at 522 Clay Street, San Francisco, and was such during the month of January, 1945. An order for meat was received from the War Shipping Administration for the Steamship Sea Perch in January of 1945. It is U. S. Exhibit No. 3 in evidence.

On January 16, 1945, I received a visit from two persons who represented themselves to be chief steward and assistant steward of a ship. It was between ten and two o'clock. Prior to that I received a telephone call from somebody. Following the telephone call, about 15 minutes later two persons came to my office. Of the two gentlemen who called I recognized the defendant Rodriguez as one of them. I had a conversation with these gentlemen in the office of Mr. Ed Heuck. Those present were myself, the man representing himself to be the chief steward, and his assistant. Rodriguez represented himself as the chief steward. I did not know his name at that time.

Exception No. 4

Q. At this time and place what was the conversation? What was said, and by whom?

Mr. Friedman: I will object on behalf of the defendants Chevillard and Patron to such conversation had out of their presence between other parties as not binding on them and not connected with them in any way. [79]

The Court: If it is not connected up I will strike it out on your motion later on. It is going to come into the record as against the particular defendants, so it becomes a mere matter of procedure in that way.

Mr. Friedman: Of course, I may not clearly have understood what you and other counsel discussed, but is this the correct understanding, that these conversations, transactions, and events that may have occurred between any witness and any one defendant are being admitted in the case as if the other defendants had objected to the materiality and binding effect on them, as if they had noted an exception to it and subsequently we are given the right to strike them out without the necessity of making the objections as we go along?

The Court: That is correct.

Mr. Friedman: As long as that is the understanding, I won't interrupt any more.

The Court: It is just a question of who makes the motion at the proper time, whether the Government makes the motion that it be introduced as to all defendants or the defendants introduce a motion to strike. I think it would be more orderly

the second way. You will be more interested, each of you, in the competency of the testimony as to your respective clients and in a better position to point out the nature of your motions.

Mr. Friedman: I just wanted to be sure that we wouldn't be in a position of not having objected to something.

The Court: The position is clear now.

The chief steward stated that he had or his company had placed with our company an order for some 36 or 38,000 pounds of beef, that they did not require that much beef on the ship, that there already was more than was reflected by their inventory and that up to 25,000 pounds of that beef might be diverted to some other use, that he was willing to furnish my company,—that he was willing to see that my company received receipts for the delivery of the entire order, but that up to 25,000 pounds of that order should not actually be delivered to the ship, that we were to bill the entire quantity as ordered and dispose of a portion not delivered for our mutual profit. Nothing was said as to what our mutual profit was to be, only that it was to be divided three ways between the chief steward and the assistant steward and myself. I stated that all our deliveries to the ships were for the account of the War Shipping [80] Administration, United States Government, that it would not be practicable to attempt to divert meat consigned to the Government to any other source. The chief steward and assistant steward both assured me that it would be a very simple operation, that

our bills would be receipted for as a complete delivery. I stated that we would have no means of disposing of this meat anywhere else because everything we sold was to the Government. The assistant steward explained that he had arrangements or connections whereby he could himself dispose of the meat that was not delivered to the ship. I told him that I would like to think about that a little bit and meet them at some future date. I wanted to talk to my principals about it. When I say "the chief steward" I mean Mr. Rodriguez. Both of those men then left my office and stated that one or both of them would contact me again.

Following another telephone call on Wednesday, January 17, 1945, I met the assistant steward at noon at Tadich Grill on Clay Street, right across from our place of business. He told me that the ship for which this meat was ordered was the Sea Perch, that it would be loading sometime the following week and that he would like to get from me a list of everything that we were to load on that ship. I told him that I would get that for him and deliver it to him when we met another time.

Following another telephone call on Friday, January 19, 1945, I met the assistant steward at the corner of Montgomery and Sacramento Street. We walked to the Palace Hotel. I gave him a list of the complete meat order for our ship that was placed with our company, sat down in the lobby of the Palace Hotel after picking up some memo paper from the American Trust Company Branch

Office there, made a list, and went over the list with the assistant steward. The list prepared at the time showed [81] a certain quantity of beef, W. A. S., meaning War Shipping Administration specification. It did not show what the cuts are or any breakdown of it. The assistant steward told me that only the choice cuts of meat were to be withheld from delivery to the ship and should be loaded in a separate truck. He wanted to know the quantities of each different cut of meat that would make up this order. I went into the telephone booth with the assistant steward, called our office, obtained the percentages of the various cuts of beef according to the War Shipping Administration's specifications and the assistant steward wrote those percentages down on a slip of paper in the booth as I called them off for him from my end of the telephone.

I recognize the paper you show me. I listed the items on this piece of paper on the left side of what I would call the front of it. Over on the right side, in the assistant steward's writing, are the percentages of the various cuts of beef as he copied them down as I called them to him. This paper only has the beef on there. The assistant steward made the entries on the right hand side of that sheet.

(The document just testified to by the witness was admitted in evidence and marked U. S. Exhibit No. 4 against the defendant Rodriguez, and for identification against the remaining defendants.)

When I first talked to the chief steward and assistant steward, the assistant steward said I should refer to him as "Joe." At that time I gave to the assistant steward my home telephone number—Tuxedo 6825.

At the Palace Hotel, after obtaining the percentages of the various cuts, the assistant steward and I sat down and made up a list according to his description of what would make a truck load somewhere under 25,000 pounds. About 19 or 20,000 would be the limit of any of our trucks. We listed all of the [82] choice cuts of beef according to the list I just identified and some pork items and some veal and lamb. I was directed by the assistant steward that that should be the meat that should be put onto a separate truck that should be withheld from delivery to the ship and the assistant steward explained that day as to how this truck might be delivered. He told me that the truck might go to the dock, the same as our other loads, would be loaded on the ship if there was anything to arouse suspicion, otherwise would be driven away by some truck driver to be furnished by him. He asked if we had a truck driver who might be taken into our confidence for not too large a fee to drive the truck and I told him that we probably could. He suggested that he contact a truck driver employed by our company that I might designate. I told him to call our place of business the next morning at nine o'clock and ask for Frank and I would arrange with Frank that he was to answer that call and would join the

assistant steward and the assistant steward would explain to this truck driver direct what he was to do with the truck.

At nine o'clock on the morning of Saturday, January 20, 1945, a telephone call came. I had instructed our telephone operator that when someone asked for Frank at nine o'clock to place that call on my phone. I asked the assistant steward to meet me at the same place—Montgomery and Sacramento Street—that I wanted to talk with him about the truck driver. I met the assistant steward at eleven o'clock and told him I thought it would be better for us to place this loaded truck on Sansome Street, right adjacent to our plant and just let it sit there and have his own driver come and pick it up. We walked to the place where I showed him the truck would be. On the way I told him that this was an impossible deal, that it just couldn't be worked. I told him that there no doubt were a dozen people, probably FBI people, following us, that I would [83] show him where the truck would be, but I recommended to him that he leave the truck alone. He assured me everything was all right, that he had all of his plans for the disposing of the meat.

On Monday, January 22, I had a call from the assistant steward asking me to meet him at Tadich Grill as he wanted to make arrangement about the delivery receipts for the entire order of meat. At noon I met him and I told him that he had better forget the whole deal, that it wouldn't work, but that if he wanted to go ahead the bills were on the

seat of the truck, the delivery receipts for the entire order of meat.

On Tuesday, January 23, 1945, I received another telephone call from the assistant steward, asking me if the truck was sitting out there on Sansome Street. I told him it was. He asked if the delivery receipts were on the seat of the truck and I told him they were. On this truck which was on the corner of Sansome and Merchant Streets there were approximately 17,000 pounds of pork and lamb from the order for the Sea Perch. At 3:40 p. m. on Tuesday, January 23, the assistant steward came in my office, handed me the signed delivery receipt for the entire lot of meat order for the Sea Perch, including that, that was on the truck at that time sitting out on Sansome Street. I saw it there still. The paper you show me is the one handed to me by the assistant steward. There were several copies of it. I put a notation on there showing I received it at 3:40 p. m., January 23, 1945. It is the delivery tag from which we prepare our billing against the War Shipping Administration for delivery to their agents the United Fruit Company for collection of our charges. It covers all the beef items and all of the other items of meat ordered from us for the Sea Perch except some pork shoulders that were on a separate order and separate delivery receipt. That receipt includes approximately 17,000 pounds still on the truck as testified to by me. The total amount of meat this sheet [84] calls for is approximately 64,793 pounds. I don't know the exact weight.

The delivery receipt testified to by the witness was marked U. S. Exhibit 5 in evidence against Rodriguez and for identification as against the remaining defendants.

The name of the man I have referred to as the assistant steward is Barral. The truck loaded with 17,000 pounds of meat remained at the corner of Sansome and Merchants Streets more than half an hour following receipt by me of this receipt for the meat. I did not see it drive away.

Cross Examination

(By Mr. Zirpoli)

On Saturday, January 20, I had a conversation with the assistant steward in which I stated to him that the deal was impossible. He stated several times that arrangements were made for disposition of the meat. He never told me what the arrangements were. He implied to me that he would never know where it went.

(By Mr. Friedman)

It is correct that I received this paper at 3:40 p. m. on January 23. On that day the truck was placed on Sansome Street at nine a. m. and remained there until four o'clock that afternoon. I do not know how long it remained there after four o'clock. I did not see the truck leave. It was a truck of the Ed Heuck Company. It had the name of the company on the side of the truck up by the cab. It was a motor truck and had approximately

17,000 pounds of meat in it. On that day, over a period of several hours from early morning, meat was delivered to the Sea Perch. The meat left the storage warehouse periodically during the day. I don't know how long but probably over a period of three or four or five hours. I don't know the time when the first load started or when the last load went to the ship. [85] Each load that went to the ship did not carry with it, its own inventory or receipt. I do not know how many pounds of beef were delivered to the Sea Perch that day.

(By Mr. Abrams)

Part of this meat delivered to the Sea Perch came from the National Ice and Cold Storage Warehouse on Battery Street and part of it from the Lawrence Warehouse Company freezer located on the premises of the Ed Heuck Company, on Clay Street. We ordered the ice house opened that morning at seven o'clock at which time the meat started to come out of the storage plant. All of the meat in this particular truck was frozen meat. All of the meat going to the Sea Perch normally would have been delivered before noon.

(By Mr. Resner)

We had a man employed at my company whose name is Frank Manzifero. I have direction over telling my subordinates as to where what meats will be delivered. I had authority to place this truck loaded with 17,000 pounds of meat on Sansome Street and I did so. I had authority to do

anything on behalf of the company. I withheld that 17,000 pounds of meat from the Sea Perch.

On Saturday, January 27, 1945, I went to the City Jail in San Francisco on Washington Street, below Kearny with Mr. McGee of the FBI. A man held as a prisoner was brought out and I said, "Yes, that is the man." The man was the chief steward. I did not know his name then. I now know it to be Rodriguez.

(Thereupon an adjournment was taken until March 7, 1945, at ten a. m., whereupon the trial was resumed and Elroy Hinman took the stand and his cross-examination by Mr. Resner continued, as follows:)

(Witness continuing): The first time I discussed the case with the FBI was January 19, 1945. On January 16 I received [86] a telephone call but I did not recognize the voice that called me. After talking to Barral and Rodriguez I did not identify the voice on the telephone and I could not say that it was Rodriguez who called. The voice that spoke to me on the telephone said that he was chief steward of a ship. I do not know whether he gave its name. He said he had some important business and would like to come to talk with me privately. He asked if I was general manager of the company. I told him I was. The voice said he was the steward. I do not recall the use of the words "chief" or "assistant." I think it was a more fair statement to say that the voice merely said "steward". I would not say whether he said "chief steward." I know who Barral is now. He is not

in court now. I have not seen him. I would not say which man opened the conversation on January 16. They both did lots of talking. In this conversation somebody said they had more meat on the ship than the inventory showed. They both said that and repeated it. Then the suggestion was made that I divert this meat. I had never seen these men before. I fell in with this conversation and discussed it with them at some length. They both said that we would receive a receipt for the full delivery. Both insisted that we would be given a receipt for the entire order. These men were in my office in the vicinity of thirty minutes. From that day until January 23, I did not see Rodriguez again nor hear from him by telephone or by written communication. I saw Rodriguez on January 16 and never saw him again until I saw him in jail.

Further Cross Examination

(By Mr. Friedman)

Referring to U. S. Exhibit No. 5, John Lawler, a man in our employ, prepared it. It was done under my supervision. I never saw the requisition when it came in. This was the first time I have seen it. The receipt for the 66,000 odd pounds of [87] meat was prepared from the order received from the United Fruit Company. I did not check the receipt back with the order although I know it was prepared from that order.

I have general supervision over the preparation

and sending of bills. I had something to do with the sending of the bills for the meat that was sent to the Sea Perch. I do not know whether a bill was sent to the United Fruit Company for this meat. I would have to depend on the records.

United States Exhibit No. 3 is the order for the meat approximating 59,000 or 60,000 pounds. There is a differential of over 6,000 pounds between the original order as placed and the amount of the receipt. I do not know whether there was another order besides Government's Exhibit No. 3.

Re-direct Examination

(By Mr. Hammack)

Government's Exhibit No. 3, the purchase order from the War Shipping Administration for meat for the Sea Perch, is merely an approximation. It could be varied sometimes by supplying less meat. In the event we are not able to supply a particular type of meat ordered we confirm with the company their willingness to accept a substitute or find out if they want something different. So the orders are not usually filled in precisely the same manner they are sent. Government's Exhibit No. 5 represents the exact amount and weight of meat that was shipped in pursuance of this order.

The paper you showed me was prepared by me from the list that I made at the time Barral and I went over to the Palace Hotel to supply what would be put on the truck, that was not to be delivered to the ship. I prepared the list and

gave it to our men who had charge of loading and requested the meat described on here to be placed on board a separate truck. Barral was not present when I prepared this list. I prepared [88] it to confirm with what Barral asked to put on this separate truck. This last represents the meat that was to go on the separate truck. (The list was marked U. S. Exhibit No. 6 in evidence against the defendant Rodriguez and for identification against the other defendants.)

Further Re-cross Examination

(By Mr. Abrams)

I prepared that list early in the morning of January 23 and gave it to the man who supervised our loading. It was my compilation of what was to be loaded on this one separate truck. To my knowledge no one saw this list except someone in my firm.

(By Mr. Friedman)

I do not know whether the company of which I am manager sent to the Sea Perch, United Fruit Company and/or the War Shipping Administration, meat equivalent to the amount that was in the truck on Sansome Street. At no time did I send another truck to this ship to complete this order. The meat that was sent by the Ed Heuck Company to the Sea Perch on or after January 23 was 17,000 pound less than the so-called receipt, Government's Exhibit 5, shows. The original order

that was placed with my company was not altered to the extent that it reduced the amount of meat by 17,000 pounds. As manager I had supervision of the books of the Heuck Company. Our books will contain a record of what was billed against the United Fruit Company, War Shipping Administration, together with the quantity and amount of deliveries that the bill represents. Those books are under my general supervision.

Exception No. 5

Mr. Friedman: Might I ask that the witness be instructed to produce the books?

The Court: I do not know that there is any reason for the granting of that. [89]

Mr. Hammack: To which I object, as to what the books show in regard to billing; it would be improper cross examination.

The Court: Unless some more adequate reason is shown I will deny it.

Mr. Friedman: I will wind this up by stating that while this witness ordered 66,000 pounds of meat to be placed upon the various trucks and ordered 17,000 pounds, approximately, placed in one particular truck, and that this witness said as far as he knows the only amount of meat that was made up and delivered to the Sea Perch that day was the 66,000 pounds less the 17,000 pounds, that even for the purpose of testing this witness' recollection or even impeaching his testimony I have a right to see the books that are under his supervision.

The Court: I do not think there is any materiality to your point. I will sustain the objection.

Mr. Friedman: Note an exception.

Testimony of Dean Heuck for the United States

DEAN HEUCK

produced as a witness on behalf of the United States, having been first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am a partner for the Ed Heuck Company, located at 530 Clay Street. It is a limited partnership, consisting of my brother, who is the general partner myself and Miss Pasquini, who are limited partners. During the month of January, 1945, I supervised an order of meat for delivery to the Steamship Sea Perch. Five trucks were required to handle the entire order, four large ones and one small one. The small one was loaded at 530 Clay, the four large ones down at Battery, at National Ice. Three large trucks and one small one actually delivered meat to the [90] Steamship Sea Perch. The fourth truck was placed out on Sansome Street, between Merchant and Washington. I recognize Government's Exhibit No. 5 in evidence. It is the receiving bill supposed to be delivered to the Sea Perch. It represents the entire order of meat for the Sea Perch—about 64,000 pounds. As far as I know there was only four trucks of meat delivered to the Sea Perch. The truck not

delivered had on it around 17,500 pounds, which is included in this shipping tag and was not delivered.

(Thereupon certain sacks, boxes and cartons containing meat were brought into the court room.)

(Witness, continuing): Government's Exhibit No. 6 was given to him by Mr. Hinman, the general manager. I was told to separate these special or certain cuts and load it on this one truck. I did so with the exception of the pork loins and the veal. I am referring to the large International truck that was left on Sansome and Merchant Streets. I recognize those boxes in the courtroom. That is the trimmed tenderloin. It was part of the shipment placed on the truck parked on Sansome Street.

I was in company with the special agents of the FBI down at the Millbrae Dairy when certain meat was recovered by the FBI. The meat recovered there was the meat that had been placed on this special truck that had been parked at the corner of Sansome and Merchant Streets. These three items—the box, the sack, and the carton of meat—were part of the meat that was recovered in my presence by the agents of the FBI at the Millbrae Dairy on January 23, 1945. The large box contains fabricated lamb. The sack contains oven prepared rib, and the carton contained trimmed tenderloin. These three items are typical of everything that was in that truck.

(The wooden box was marked U. S. Exhibit 7a, the carton 7b and the sack 7c. All three were admitted in evidence [91] against the defendant

Rodriguez and for identification against the remaining defendants.)

Cross Examination

By Mr. Friedman:

I supervised the loading of the fifth truck that never reached the Sea Perch. I did so in a manner to conform with the information that Mr. Hinman gave me as to what should go in that truck. I can identify them by the lot numbers of meat scheduled for that ship. I examined the lot numbers when they were taken out at Millbrae. When Mr. Hinman told me of these special things that were going to this special truck I was told why they were to be segregated from the other portions of the shipment. When I put these things in the special truck I knew that the contents of that truck were never to be delivered to the Sea Perch and I knew that the other four trucks were to be delivered to the Sea Perch. The 17,000 pounds of meat on the special truck was never delivered to the Sea Perch and another 17,000 pounds was never delivered to the Sea Perch to take its place.

Exception No. 6

Q. I see. Who did you bill for this meat?

Mr. Hammack: I object to that, may it please Your Honor, on the ground it is improper cross examination.

The Court: I will sustain the objection. An exception may be noted on behalf of all defendants.

Exception No. 7

Mr. Friedman: Was your company ever paid for the meat?

Mr. Hammack: Same objection, Your Honor.

The Court: Same ruling, same exception.

By Mr. Resner:

I have seen Government's Exhibit No. 3 before. It is [92] not added up with regard to any total. All the typewritten figures were on there when I received that order. I do not know who made the pencil notations in the left hand column. I do not know whether the pencil notations indicate what in fact was actually sent to the vessel. I do not know what the pencil notations mean. Those penciled notations were not on there when I received the order. I do not know Mr. Rodriguez. The only time I saw him before was once up in the jail where I was taken by the FBI. The FBI asked me if I recognized the man. There were two men there. I did recognize Barral. I didn't recognize Rodriguez at the county jail.

By Mr. Abrams:

(Mr. Hammack then delivered to Mr. Abrams an inventory of the packages that were checked at the Millbrae Dairy on January 23.)

Referring to the memorandum you gave me it says here there were 321 packages checked at the Millbrae Dairy like Government's Exhibits in evidence 7-A, B and C.

Testimony of Melior Brandt-Neilson for the
United States

MELIOR BRANDT-NEILSON,

produced as a witness on behalf of the United States,
being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am a checker. I check ship's stores for the United Fruit Company and was so employed on January 23, 1945, on the pier at the Army Base in Oakland. I was checking supplies on the Sea Perch on January 22 and 23rd. During the course of the day I received some meat from the Ed Heuck Company of San Francisco. I can't remember the exact number of trucks, there were three or [93] four. I was on the dock all the time. I was unable to check the meat that was unloaded from these trucks. I did sign a receipt of the Ed Heuck Company for the meat received. The second steward—the storekeeper gave me the Heuck tags. His name is Barral. He handed me the papers and I did not understand him so well, but he said something about the amount of meat at the time or something like that. Having signed the delivery tags I gave Barral three to give back to the drivers and put five in my brief case for the office. Afterwards I gave the five I put in my brief case to Mr. Hamburg. I gave three to the second steward and five to Henry Hamburg. Government's Exhibit

No. 5 in evidence is the shipping tag which I signed. That is my signature.

I know Mr. Rodriguez was chief steward on the Sea Perch on January 23, 1945. I have bad sight.

(Thereupon the witness walked down into the courtroom and indicated the defendant Rodriguez.)

On January 22, 1945, in the morning, I had a conversation with Rodriguez in his room on the Sea Perch. No one else was present. We were sitting down talking about economy of stewards in food supplies and wasting food and the chief steward said, "If everyone of the stewards would take care of the food we could save lots, many thousands of pounds of food for the company." He said that for his part, "I saved about 10,000 pounds of beef." He didn't say which way he was saving it or that he put it on his inventory or anything like that. He said, "I went up to Heuck Company, I talked to the sales manager, and I have 10,000 pounds of beef, I have so much I don't know what I shall do with it, if I am supplied all of the meat that you have in the order I don't know how I shall use it, or what I shall do with it." The salesman answered him, "Well, we can use all of the meat for another ship, we could use it, we have a lot of ships that can [94] use all of the meat that we can get. So can you return some meat we will be glad to pay for it, and pay you for it," or something like that. Well, I was looking at the chief steward, because I was surprised, and I couldn't understand him so well, I couldn't get what he meant. He says, "What about it, shall we make the money?"

—and he mentioned a hundred dollars; well, I didn't get about the hundred dollars, whether it was from Heuck to me or if it was coming from him to me, and I was sitting still. Somebody knocked on the door then and the both of us went out.

Cross Examination

By Mr. Friedman:

My duty is to receive and check the stores. It isn't always that we can check the stores unless we have two on the dock. When I check it then we just let the driver put the stores on the floor or anything and then we sign the paper. When we have the opportunity to check it, we check it and make a short list of it which goes to Mr. Hamburg or Mr. Marchal. There are times when I do not check the stores against the receipts. When there are so many loads on the dock I can't check them alone. When I signed this receipt that has been shown to me I didn't know whether I had received that amount of stores or not. I didn't know how much meat there was. I couldn't check it because when I signed it they had it all mixed up, the checked and unchecked and stored it aboard the ship. When I did get time in which I could check these stores they were all mixed up with other stores and it was impossible. They were all mixed up with supplies that came from other firms besides Heuck Company. When we have time we check the stores and if something is short we make a short list. That is a list showing the items that are short. I did not make a short list of the meat that came from Heuck Company on January 23, when Mr. Barral gave me

the tags to sign, I signed them. I knew Barral before. I can't exactly remember what Barral said when he gave me the tags to sign. He said [95] "Here is some paper for the meat." Something like that and I took the papers and signed them and gave him three and put five in my brief case. I did not ask Barral if the meat had been checked. Barral had nothing to do with checking the meat.

By Mr. Abrams:

Referring to Government's Exhibit 5, that is one of the papers that Barral gave me. He gave me eight copies of the same. That is a delivery tag for the meat. I turned three over to the second steward for the drivers of Heuck and five to the company.

By Mr. Resner:

I have been a dock checker for two years and directly and indirectly connected with the United Fruit Company since 1938, but for three years I was port steward for ships under the Danish flag. On January 23 I was the only dock checker on the ship. Mr. Barral approached me about lunch time, maybe 12 or one, maybe before that. He handed me eight copies of this delivery tag. That procedure of the second steward giving me the delivery tags and asking me to sign them was in the usual course of business without it happening all the time that way. When a delivery tag like this, indicating that there are 60,000 pounds of meat in the trucks, is given to me I am supposed to check the meat in the trucks as against the delivery ticket. That is my job if I can do it. When Barral handed me the delivery tickets

and I signed them that was something that I had been doing every day for months in checking cargo on the ships. If I had time to check I checked before I signed and if we don't have time to check we sign the delivery tags anyway and check it later. I could not have kept that cargo on the dock until I checked it. I have nothing to do with loading the stores. As checker I have no authority to keep cargo on the dock. I can't stop it from being put on the ship. The Army is against keeping the stores on the dock. It wants it all loaded on the ship as fast as possible. [96] During the time I have been working as checker this same thing had happened before, that is, cargo coming down to the dock where I signed for it without checking it and it got onto the ship before I checked it. There was nothing unusual about Barral asking me to sign this ticket although it was the first time he had ever asked me to do so. Rodriguez did not present anything to me to sign. At no time in connection with the Sea Perch did Mr. Rodriguez give me anything to sign or talk to me about anything to be signed.

On January 22, when I went to Rodriguez on the Sea Perch he was there. There was nothing wrong about the conversation I had with Rodriguez. He said that the big item aboard these ships that the vessels took was the waste. I know that there was a lot of waste. Rodriguez said that on this last trip that the Sea Perch had just come back from, that he had saved 10,000 pounds of beef. Rodriguez said that the man at Heuck Company had told him that "if you could return any of the meat we would be

glad to pay you for it." I can't exactly remember what the words were about the \$100.

Redirect Examination

By Mr. Hammack:

Ordinarily when drivers deliver supplies for a ship it is the drivers who deliver supplies and ask me to sign for them.

Recross Examination

By Mr. Friedman:

When four or five truck loads of things come to the dock, whether from the same company or different companies, each driver of a truck has his own delivery tag. Prior to January 23 nobody had told me not to check the meat that was going to come to the Sea Perch from the Heuck Company and prior to the time Barral gave me those eight papers to sign nobody told me to sign any papers that Barral should present to me. [97]

Testimony of Henry Hamburg for the United States

HENRY HAMBURG,

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am in the employ of the United Fruit Company in charge of receiving ship's stores. It amounts to

my being chief checker. I was so employed on January 23, 1945, and I was kept in the office of the United Fruit Company until approximately twelve o'clock, at which time I crossed the Bay and came to the Sea Perch at one o'clock. The Sea Perch was berthed at the Oakland Naval Supply Depot, Pier 4. The Sea Perch is a troop transport. Shortly after I arrived I received from Mr. Brandt-Nielsen, who was checking stores receipted delivery tags which, among others, included certain items from the Ed Heuck Meat Company. I received five copies which I took aboard ship, along with the other papers I had, to the chief steward's room on the Sea Perch and prepared the papers for signature and awaited the appearance of the chief steward, Julio Rodriguez. The paper you show me is one of the tags given to me by Mr. Brandt-Nielsen covering the delivery of the meat from the supplier named on the tag—the Ed Heuck Company. My name appears there in stamp. It is stamped on that tag for me to sign and that is the name of Rodriguez, the chief steward. He signed it at my request sitting along side of me in his room. (The tag was marked U. S. Exhibit No. 9 in evidence against the defendant Rodriguez and for identification against the remaining defendants.) Following the signature of myself and Rodriguez on this delivery tag I took it back to the accounting department of the United Fruit Company. I personally hold them until the invoices comes in when they are matched with the supporting [98] invoices of the supplier. The tags go to Mr. Bugglem of the United Fruit Company.

Cross Examination

By Mr. Friedman:

When I turn these tags over to the accounting department they do not immediately leave my jurisdiction. I hold them until the invoices come in and they are matched against the supplier invoice. I prepare a copy from that supplier's invoice to give to the chief steward so he will know what the prices are because he is required to compute certain costs per man during the voyage. When I receive one of these tags from the dock checker I prepare it for the signature of the chief steward and for my own signature. It is one and the same act. I stamp it when I am satisfied that it has been received from a supplier along side of the ship. I stamp it and sign it, which means my approval and I in turn give it to the chief steward for his signature. When I say I prepared this paper for these various signatures I mean I put this red rubber stamp on there. I am required to sign it. I satisfied myself in this particular instance that the tag represented the stores that had been delivered upon the word of Mr. Brandt-Nielsen. I asked him if this was the complete order and he answered, "Yes." When I went to Mr. Rodriguez for his signature I presented it to him for signature. I had with it a good many other tags covering other stores from other suppliers for which I was waiting in his room for him to sign. Among these were the Heuck Company and when he came in I told him I wanted his signature on every one. I simply presented the tags and said, "Here are the materials you received

and I want you to sign on the tag." I did not ask Rodriguez if he had checked the stores to see whether the tags correctly represented the goods received. When I arrived on the dock at one o'clock at least one of the Heuck Company's meat trucks [99] together with other trucks from other suppliers was unloading. I asked Rodriguez to sign these tags from forty-five minutes to an hour after I arrived. There were four copies of each tag for Rodriguez to sign and I would say that there were at least from twelve to twenty tags. I simply said to him, "Here they are, sign them," and he signed them all. It is not the duty of the chief steward to be down on the dock checking supplies. Technically it is my duty, but I have an assistant, Mr. Brandt-Nielsen, and under ordinary circumstances when we receive supplies I am present; and there were circumstances which delayed my coming over this morning, which meant that Brandt-Nielsen was alone checking supplies until I arrived at one o'clock. The red stamp placed on there certified to the correctness of the amount of material described on that tag as having been received alongside of the ship. Ordinarily when these tags are presented to the chief steward to sign, as a matter of fact the chief steward does not know whether the stores are there or not. He takes my word for it.

Testimony of Harold Buggeln for the United States

HAROLD BUGGELN,

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am chief clerk in charge of accounting for the United Fruit Company and as such I audit or see that the bills and invoices rendered to the United Fruit Company for the War Shipping Administration are checked and audited. Government's Exhibit No. 9, a shipping tag from Ed Heuck Company, I probably saw the next day after the delivery was made when these were sent in to the office. If delivery was on January 23 I would have seen it January 24. Upon receipt of the tag it is held for the War [100] Shipping Administration. The tag is used in the preparation of payment for the materials and supplies which the tag calls for.

Cross Examination

By Mr. Friedman: [101]

The tag is used in support of the invoice. It indicates the receipt of material. Before an invoice can be paid you have to be certain that the material has been delivered and the only way you have of being certain is from this tag. When I get the invoice I check it against the tag.

Exception No. 8

Q. When did you check the invoice against this tag?

Mr. Hammack: To which I will object, may it please your Honor, on the ground, it is improper

cross examination. He did not testify he did check it against the invoice.

Mr. Friedman: Withdraw the question.

Q. Did you check this tag against the invoice?

Mr. Hammack: The same objection, may it please your Honor.

The Court: I will sustain the objection and note an exception in favor of all the defendants.

By Mr. Resner:

When I received this paper I held it until the invoice was received—it is held on the invoice clerk's direction until the invoices are received. It eventually was sent to New York to our New York office, who make the payments. In the ordinary course of business and in order to prepare the papers so that payment can be made, it is necessary that in addition to delivery tags that we have invoices. The United Fruit Company pays my wages and has done so ever since I worked for them. I am not an employee of the War Shipping Administration.

By Mr. Friedman:

This paper was eventually sent to the New York office. It was accompanied by an invoice from Ed Heuck Company. When I say this paper I mean one of the duplicates and an invoice was sent along with it. A copy of that invoice was kept here and is still in my custody. This tag and an accompanying invoice was [102] sent to the New York office for payment. When I sent the duplicate of United States Exhibit No. 9 on to New York for payment of the

invoice it called for payment commensurate with the amount of meat mentioned in this tag. I received from the Ed Heuck Company an invoice calling for payment to them of the 64,000 odd pounds of meat. I do not know whether it was paid.

Redirect Examination

By Mr. Hammack:

The meat that was recovered by the FBI in the warehouse at Millbrae and is now in storage in the Army warehouse in San Francisco, now belongs to the United Fruit Company or the War Shipping Administration and is paid for—at least the bill for the same was sent on to New York for payment. When I received this shipping tag calling for 64,793 pounds of meat I knew that some of it had not been delivered. How much of it I did not know at that time. I heard the amount the next day on January 24.

Recross Examination

By Mr. Friedman:

When I knew that all the meat represented by the invoice had not been delivered I did not make any change in the invoice. When the invoice was sent to me by Ed Heuck Company an explanation went along with it, and I forwarded that information on to New York. A letter of explanation went to New York with the invoice stating that so many pounds of meat were recovered, but as we had indicated receipt for the material in full by our checker we felt obliged to pay for that meat. Furthermore, that the meat

would be held in refrigeration in the warehouse pending the outcome of further investigation and possible trial and that after it had served its purpose it would be delivered to us for consumption on one of the other ships.

By Mr. Resner:

As my checker had receipted for the meat [103] the United Fruit Company felt responsible. Mr. Neilsen is paid by the United Fruit Company and so is Mr. Hamburg. Neither of those gentlemen is an employe of the United States or the War Shipping Administration.

(Later in the trial Harold Buggeln was recalled and testified in substance, as follows:)

Direct Examination

By Mr. Hammack:

All bills for all supplies for the ships operated by us for the War Shipping Administration were paid by our New York office from a joint account which is established in accordance with the general agency agreement.

Cross Examination

By Mr. Friedman:

I did not bring with me a copy of the invoices. We did not get a letter from the Heuck Company. There was a letter that accompanied the invoice for the meat they delivered to the Sea Perch. I wrote the letter that I sent on to New York accompanying that invoice.

By Mr. Resner:

The morning following January 23 was when I was first notified that there was any deficiency in the shipment of meat on the Sea Perch. After the FBI was down at the office making an investigation I gathered from him that some truck load of meat did not arrive at the Sea Perch and should have. It was on that information that I received from the FBI that I subsequently wrote this letter to our New York office accompanying the invoice which came from the Heuck people. There was nothing on the list whatever that came from the Heuck people to indicate that any of the items on that invoice had not been delivered. [104]

Testimony of John Lawler for the United States

JOHN LAWLER,

produced as a witness on behalf of the United States being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I have charge of inventories for the Ed Heuck Company and was so employed during the month of January, 1945. I prepared a shipping tag for an order to the Ed Heuck Company from the War Shipping Administration to be delivered to the Steamship Sea Perch. Government's Exhibit No. 9 was prepared under my supervision. It represents the total amount of meats to fill the original requisition

of the United Fruit Company for this ship. The total amount of meat represented is 64,793 pounds. These figures were arrived at from the weights that are taken from one of our warehouses, the National Ice & Cold Storage Company. We receive an out tag of every item that goes in there under a lot and we take the combined lots and their net weights and combine them and that is the total set for the shipper.

(Here the witness identified certain tags showing meat withdrawn from the National Ice and Cold Storage Company which tags were marked United States Exhibits Nos. 10-A and 10-B for identification.)

Subsequent to January 23 I did go down to examine some meat that had been recovered from the Millbrae Dairy and the lot numbers on that meat were for the order covered by the shipping tag Government's Exhibit No. 9. I did this sometime last week.

(Later in the trial John Lawler was recalled as a witness for the United States and testified as follows:)

The total weight of the meat withdrawn from the warehouse for the Sea Perch order was 64,793 pounds. [105]

(Thereupon the court admitted United States Exhibits for identification 10-A and 10-B in evidence as United States Exhibit No. 10.)

Testimony of Pierre Francois Barral for the
United States

PIERRE FRANCOIS BARRAL,

produced as a witness on behalf of the United States,
being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am one of the defendants named in this case and have heretofore pleaded guilty in this court and I am now awaiting the judgment of the court following my plea of guilty. I know the defendant Julio Rodriguez and I also know the defendants Fernand Chevillard and George Patron. I have known Mr. Patron about sixteen months. At one time I went to sea with Patron on the ship Monterey. That was in 1943, from June to September. Patron and I were in the steward's department. After I left the Monterey I went on the Sea Perch. My two first trips on the Sea Perch were as supervising chef and one trip as second steward the last trip. The last trip commenced in October and ended in San Francisco, December 28, 1944. I was in port in September, 1944, and saw the defendants Patron and Chevillard. I went up there with the defendant Rodriguez. In September, 1944, I had a conversation with Patron and Chevillard in connection with meat in the Normandy Restaurant. It was at night and no one else was present at the conversation except Chevillard and Patron.

Here a discussion took place between court and the various counsel as to conversations and physical evidence taking place or referred to with or in the presence of one defendant and out of the presence of the others, as follows: [106]

Mr. Zirpoli: I object to the conversation. For the purpose of the record I want to object to any conversation as not being binding in anywise upon the defendant Vincenzini.

The Court: The Court will note that objection.

Mr. Resner: As to all defendants?

The Court: That will apply.

Mr. Abrams: We are starting over again.

The Court: Mr. Zirpoli wanted to make the point again.

Mr. Zirpoli: I went over the record as it was prepared yesterday, and whereas the record yesterday seems to indicate that an objection is being saved for all defendants as to all witnesses that have appeared, I feel that an objection is necessary to justify a motion to strike, and whereas the record seems to indicate that such an objection is saved, I also noted statements made by the court and counsel and at the same time exceptions were not saved, and I want to protect the record in that respect. If I can have it understood that to have been the record, objections as to all witnesses that have appeared heretofore, and that the objections have been, certainly in so far as my client is concerned, based on the ground that their testimony is immaterial and in nowise binding upon my client, and that such objections have been overruled and an exception noted,

of course I have no desire to make individual objections.

Mr. Abrams: And your Honor is also protecting each defendant in that regard with respect to the physical evidence offered?

The Court: That is my intention.

Mr. Zirpoli: I realize that was your Honor's intention, but I was——

The Court: These conversations, of course, are admissible in evidence to the extent of those participating in them, and they are in the record, but it was the intention of the court, [107] without constant reiteration of the objections, to protect your rights so that you could make a motion to strike out, and that to that end that you were deemed to have made objections and had the objections overruled and exceptions noted in each instance.

Mr. Zirpoli: I noticed in the record, for instance, there was no notation of the exception, I am glad we have had this straightened out. Thank you.

The Court: Very well.

(Witness, continuing): They asked me if I could get meat from anywhere. I told him that in no way I couldn't get the meat, because on the ship we couldn't take any meat. He asked me a couple of times if I couldn't get any meat. They just asked me if I couldn't get any meat for them, but they don't ask me if I could get meat from ship. I said, "I don't know where I could get any meat." That was all that happened in September. After that I went to sea as second steward. Rodriguez was chief steward. We returned to San Francisco December

28. Before we returned to San Francisco I never talked to anyone in connection with meat or disposing of meat upon my return to San Francisco. About two days before I arrived at port I did not talk to anyone about disposing of meat in San Francisco. Rodriguez told me he had some meat on board ship. This was in the chief steward's room on the Sea Perch. No one else was present. It was about two days before we got to San Francisco. Rodriguez said he had about 20,000 pounds of meat aboard the ship that nobody knew about and he said, "Is there any way we can sell that meat?" I says, "I don't know about it yet," and he says, "How about your friend in San Francisco who speaks French." I says, "I don't know yet. We have to make port first." Nothing else was said at that time. Before Rodriguez went to New York, after we arrived in port he told me to go to the meat company and find out if we can make arrangement [108] with the company. The ship came in port on the 28th and Rodriguez left for New York on the 2nd or 3rd day after that. The conversation took place on board ship. We had been in port one or two days. No one else was present. Rodriguez told me to go see some meat company, see if I could make a deal with them, make some arrangement to sell the meat. Nothing was said as to what the deal was. I didn't do anything until Rodriguez came back from New York. He came back on Saturday, the 13th day of January, 1945. On the afternoon of that day I had a conversation with him on the ship. He asked me if I made a deal with some meat company about the meat and

I said, "No." He says, we go sometime next week and see if we can make something." That is all that was said. On Monday or Tuesday we went to see Mr. Hinman. I did not talk to anyone else about meat before I went to see Mr. Hinman. I did not call on anyone in San Francisco upon arrival of the ship. I did go to the Normandy Restaurant where I saw Patron and Chevillard. That was the first day we arrived. After Rodriguez returned from New York I talked to Chevillard and Patron. It was the same night that Rodriguez came back—January 13. It was at night. Rodriguez was not with me. I talked to Patron in the bar and I talked to Chevillard in the back of the dining room. I told Patron that I might get some meat for them and he said they were ready to take the meat any time. Then I talked to Chevillard the same as to Patron and Chevillard said he was ready to take the meat any time that we be ready.

On Tuesday, the 15th, I went to the meat company with Rodriguez about one or two o'clock in the afternoon. Rodriguez telephoned to Hinman first. We saw Hinman in his office at the Ed Heuck Company. Only Hinman, Rodriguez and I were there.

Q. Did you have a conversation at that time with Mr. Hinman in connection with meat? [109]

A. Mr. Rodriguez talked to Mr. Hinman.

Q. Tell us, now, what Mr. Rodriguez said to Mr. Hinman and what Mr. Hinman said to Mr. Rodriguez?

A. Mr. Rodriguez told him that he had some

meat on board ship, eighteen or twenty thousand pounds of meat that nobody knows about it, and if he can make arrangement to sell that meat. He says, "If you don't want to make the deal, just forget about it," and Mr. Hinman he says he don't know, he say, about it. He couldn't say yes or no, and he said that one of us, Mr. Rodriguez or I, come and see him the next day at the lunch time.

Q. Is that all the conversation you had at that time?

A. Mr. Rodriguez said we got—Mr. Hinman would get one-third and Mr. Rodriguez would get one-third, and I would get one-third.

Q. Was anything said about how the meat would be invoiced or billed, or anything?

A. Not that day, no.

Q. Was that all the conversation on this occasion? A. Yes, sir.

I met Mr. Hinman the next day and had lunch with him. I don't remember exactly what was said. We talked about the meat. I said we wanted to get about eighteen or twenty thousand pounds. The Ed Heuck Company did not have any order for meat for the Sea Perch for that time. On Sunday, the 14th, and on Monday, the 15th, and on Tuesday, the 16th, I talked to Chevillard and Patron. On the 16th I told them I might get some meat for them, that I might get some eighteen to twenty thousand pounds. I do not recall anything else said on that occasion about meat.

When Rodriguez and I talked to Hinman, Rodriguez said that the meat company will sell the meat

to some place else and keep the meat over there in the meat plant instead of sending the [110] trucks over there but Mr. Hinman said they didn't sell any meat but only supply the ship and there was no way to sell the meat some place else. Then we left.

(Thereupon an adjournment was taken until March 8, 1945, at ten a.m., at which time the witness Barral resumed the stand and his direct examination continued as follows.)

Witness (Continuing): I met Mr. Hinman at a lunch place near the meat plant the date following January 16. Hinman said it was time to make arrangement to get the meat, but we did not know how to do it that first day. Mr. Hinman said he would take care of that. After lunch I went back to the ship and told Rodriguez of the conversation I had with Hinman. Rodriguez said we will see how it is going to work. That night I went to see Patron and Chevillard in the Normandy Restaurant. I said, "Maybe we had to get the meat. I just saw the manager during the day." Chevillard and Patron said they were ready to take the meat any time it would be fixed. Mr. Chevillard said the price of the meat would be forty-five or thirty cents a pound—they would pay according to what the meat was. I understand they wouldn't pay forty cents a pound for chuck.

On the 17th or 18th of January I saw Mr. Hinman. We went I think to the Palace Hotel. Hinman had the order from the company and he showed me the order. I selected some items and told him what meat I wanted from that order. Government's

Exhibit 4 was given to me by Mr. Hinman at the Palace Hotel. I wrote on the right hand side of that paper. Mr. Hinman called up the company from a telephone booth and asked them how much meat he was supposed to get and I was marking the order when Mr. Hinman was talking over the phone. I marked down all the better cuts of beef. I had no other talk with Hinman that day. I went back to the ship and told Rodriguez about the talk I had had with Mr. Hinman. Rodriguez did not say [111] anything except that he was satisfied with the deal and how it was working out.

The next day Hinman was supposed to get in touch with the truck driver for the meat company. I did not see him but I talked with him over the phone. He did not get a truck driver. I talked to him about a truck driver at the lunch place. Hinman told me he would let me know the next day after he talked to the truck driver. The next day he called me and said he couldn't trust the man. He couldn't take a chance with that man. I had to look for a truck driver myself. Mr. Hinman gave me his home telephone number and I gave it to Rodriguez. After the talk about the truck driver I went to see Patron and Chevillard and told them if they knew somebody who could drive the truck. They said they would look for somebody, but they didn't find nobody. Up to this time I did not say anything to Patron or Chevillard about how much meat I was going to have except from fifteen to twenty thousand pounds.

I told Chevillard and Patron how I was going to

get the meat and about the delivery tags in the Normandy Restaurant on the 18th or 19th of January. I told them that we would get the meat, "not from the ship but from the meat company, that we have the meat on the ship, 20 or 25,000 pounds of meat and that we got a truck that would go to their place." I told them the meat would be coming from the meat company. I said the meat was a truck load, instead to go on board the ship it would go to their place, that meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says, "The bill will be signed by the ship's steward or the checker." They said to let them know when we would be ready to deliver the meat. On January 22 I saw Mr. Hinman in the street. He told me that truck would be loaded and be in a certain place waiting for us and that the bill will be right on the seat of the truck. [112]

That is all that was said. It was about eleven or ten o'clock in the morning.

On January 23 I went on board the ship, about nine o'clock in the morning, and there was already some truck already on the pier unloading meat and the checker was there and Mr. Rodriguez was there checking the meat, and there was an Army Lieutenant or soldier checking the meat too. All the trucks were there except that truck was in the street. Rodriguez and I were waiting for that Army man to get off the pier. Then we can find the bill. Rodriguez and I talked, said that we couldn't do nothing as long as the man was there on the pier. Rodriguez said that. At 11:30 Rodri-

guez told me to go on the truck and get the bill to be signed. The truck was in San Francisco and the bill was on the seat of the truck. I came over to San Francisco and got the receipt off the truck and went back to Oakland where I gave the bill to the checker, Brandt-Neilsen, who signed the delivery tag. Government's Exhibit No. 5 is the bill from the meat company that I gave to Brandt-Nielsen and which we signed. Rodriguez said that the checker will sign the bill or him. If the checker was not there he would sign the bill himself. Rodriguez said that he or the checker would sign the bill but that was already fixed. He didn't mention whether it was fixed with the checker or not. Then I came back to town and went to the office and gave Mr. Hinman the tag, Government's Exhibit No. 5. After I left Mr. Hinman I went up on Broadway looking for a truck driver and found Lucien De Angury. After that I went back to the Normandy and saw George Patron and told him I had a truck driver with me. Patron said, "Let us go to the place and get the truck and load it." From the Normandy Restaurant we went to the truck driver's place and the truck driver changed his clothes. Then Patron took us to where the truck was near the meat plant. Patron took us to the truck [113] driver's home and from the truck driver's home to where the truck was. At that time I knew we were going with the truck to Millbrae. I had a diagram or map as how to get to Millbrae. I had one from Chevillard. I recognize the envelope you show me. Chevillard gave that to me on the

22nd. It is a map to go to Millbrae from San Francisco.

(Here the envelope was offered in evidence against all defendant's except Vincenzini and Jacky and marked U. S. Exhibit No. 11.)

I received a second map showing the route to Millbrae from George Patron. He gave it to me in the garage place on the road where we were repairing the light for the truck. When we got to the truck we couldn't start it, the battery was dead. We finally got the truck started and started for Millbrae. Lucien De Angury was driving the truck and I was sitting with him. About half way between San Francisco and Millbrae we made the first stop. Patron was ahead of us in a car. He came back when he found out we were stuck. The paper you show me is a map from where we were to go to Millbrae. It was given to me by George Patron.

(The map was admitted in evidence as to all defendants except Vincenzini and Jacky and marked U. S. Exhibit 12.)

We had battery trouble on the trip and got a new battery from a garage. George Patron, De Angury and myself were there at the time. After we had the battery fixed we proceeded on to Millbrae. Patron was leading the way. At the Millbrae Dairy we back up the truck to unload the meat. When the truck arrived at the Millbrae Dairy there were present Chevillard and Patron and Mr. Jacky. I had never seen Jacky before. There

was also De Angury, George Patron, Chevillard, the truck driver and myself, all unloaded the meat. Jacky only checked the meat. That was about 9 or 10 o'clock at night. [114]

Cross Examination

By Mr. Friedman:

I am thirty-seven years and was born in France. I have been in America since 1940. I am not a citizen. I have my first papers. I pleaded guilty in this case.

Exception No. 9

Q. What was it you pleaded guilty to?

Mr. Hammack: I object, your Honor. The indictment speaks for itself.

Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

Mr. Hammack: It is not a question of what he thought; he pleaded guilty.

The Court: I sustain the objection. I think that is a legal question.

Mr. Friedman: Exception, your Honor.

The Court: Exception noted.

On January 15, I saw Rodriguez. Rodriguez asked me when he was in New York if I make arrangements with the meat company and I said, "No." Then he say we go sometime in week. On January 17 I saw Mr. Hinman in the lunch place about one o'clock in the afternoon. We talked about the deal, about the meat. That is the day we went to the Palace Hotel and Hinman told me the order

of meat he has got. He show me the order he got from the War Shipping Administration. He called up his company and talk over the phone about the meat and I was marking on what I showed before, the piece of paper, what kind of meat we were supposed to get from the meat company. Hinman and I decided that day the kind of meat I wanted.

The first time Rodriguez and I talked about meat it was at sea. I was second steward and storekeeper on the boat. My duties were to make the bill of fare, the menu and requisition, [115] but everything had to be o.k.'d by the ship steward. By requisition I mean that every day for what we need for the troops and crew. My duties in port are to stand by on board the ship and to take care of the repair. I have no duties on the dock. It is not my duty to check the stores that come on the boat unless the ship's steward told me so. I have seen the chief steward checking stores on the dock in different ports. In New York they do very often. I do not remember seeing him do it out here.

On January 23, there was one or two regular checkers on the dock. Mr. Brandt-Neilsen was there. I saw only one checker there. Rodriguez and I were on the dock. About nine o'clock in the morning. I saw trucks come that had meat on it. They were already there when I came on the pier at nine o'clock. I don't know how many trucks. I was only interested that morning in the meat trucks. I saw them unloading the meat from the trucks. I saw Mr. Brandt-Neilsen walking from one place to the other checking the meat, the vegetables and

the fruit. I can't say for sure I saw him checking the meat. There was a soldier or Army Lieutenant checking the meat. I am sure of that. He was counting the case, the box, you know, when they unload the truck. He was writing something down. They take the number of the case. It was because this soldier was checking this meat that Rodriguez and I couldn't get the bill signed. This is when Rodriguez told me we would have to wait until the Army man stops checking before we can get the bill signed. He said that after twelve o'clock. From nine to twelve I stayed on board the ship. I had nothing to do that day. That was my week off. There was nothing to stop me from any time between nine and twelve o'clock going up to San Francisco on Sansome Street and getting the bill off the truck. I waited until twelve o'clock until Rodriguez told me to go and get it. It took me about an hour and a half [116] to two hours to go to the truck and get the bill and come back. It was about two o'clock or two thirty when I got back to the Army Base. I looked the bill all over on my way back to the Army Base. I didn't read each item. When I came back to the Army Base about two thirty or two o'clock Rodriguez was still on the dock and so was the checker. The Army man had gone. I gave the bill to the checker and Rodriguez asked me if the checker signed the bill and I said, "Yes." Rodriguez told me to go and get the truck. Nothing else was said about the bill. Rodriguez told me that everything was fixed with the checker. He told me this in the morning before I went to get

the bill. Rodriguez told me that if the checker wouldn't sign the bill he would sign it himself. When I came back I didn't give the bill to Rodriguez first. I gave it to the checker. I didn't say anything to the checker. I gave him the bill and he signed it. He didn't ask a question. It is not my duty to give bills to the checker to be signed. I had never done so before.

The week end of January 22 was my week end off. I worked that week. I do not report to anybody when I come to work in the morning. On the 23rd I first came on the dock around nine o'clock or eight thirty in the morning. I had not slept on the ship the night before. On the 22nd I saw Chevillard and Patron at the Normandy, about eight or nine o'clock at night. I used to go there every night for dinner. I am not sure whether I saw them on the night of the 21st which was Sunday night. On that night I was in Oakland with a lady. The lady drove me to the dock on January 23. It is not a fact that I did not arrive at the ship or on the pier before eleven o'clock that morning. I arrived there no later than nine.

When at sea Rodriguez took his inventory of the meat he had on hand and said there was about 20,000 or 25,000 pounds of meat that was left over. I did not make out such inventory. [117] I only check what is in the storeroom or is in the ice box. I did check the meat. I couldn't tell you exactly how much meat there was because I didn't total the amount. I only gave him the meat—so many thousand pounds of beef, so many thousand

pounds of pork. I didn't make the total. I did that in writing and turned the list over to Rodriguez. It was then Rodriguez said he had 20,000 or 25,000 pounds of meat more than he was supposed to have on his ship according to the papers, not according to my papers. It is not a fact that after I made an inventory of meat and stores on the ship and gave that inventory to Rodriguez that Rodriguez looked it over and told me that my inventory was wrong in that he had 20,000 pounds more meat on the ship than my inventory showed. I did not ask Rodriguez how there happened to be 25,000 pounds more meat than he was supposed to have. Rodriguez said, "See if we can sell that meat." Nothing else was said at that time. Before Rodriguez left for New York, after the ship came to port in San Francisco, Rodriguez told me to go in town and look for some company where we could sell that meat, that is all he said. He told me to go see the company where we got the meat the previous trip. While Rodriguez was in New York I did not go to see any meat company. When he came back he asked me if I went to see the company, and I said, "I have no time to see anybody." He said, "You go sometime next week." That was on Saturday, the 13th. Rodriguez sent a telegram from New York or Miami to Halstead, the port steward, that he would be back about Saturday, and the same day I went to Halstead to ask him for time off because I had no time off for six months. When Rodriguez got back I got my time off. My time off started on Monday, the 15th. I

was supposed to get the whole week off—not the whole week because we was to sail on Saturday and I had to be on the ship two days before the ship sailed. On Tuesday, the 16th, we went to see Mr. Hinman. Rodriguez phoned Hinman first [118] and I did too. The first time they answered Hinman was not there. Later I called up and asked whoever answered the phone the name of the manager of that meat company. Rodriguez asked that. He called up the first time. I called up the second. Although I called up it was Rodriguez who asked for the manager. I didn't talk to anybody at the meat company. In the phone conversation Rodriguez asked the name of the manager of the place and somebody gave the name, Mr. Hinman, and Hinman said he could see him in his office. It is not a fact that I was the man that called up and spoke to Hinman.

On December 28 was when I talked to Chevillard or Patron about meat. I saw them both. Chevillard runs the dining room and Patron takes care of the bar. I first talked to Patron behind the bar. I told them we would get some meat for him if he pleased. Patron said, "You better talk to Chevillard, because he is the one that runs the food business." Then I saw Chevillard in the dining room. I told him about the meat and we might get some meat, that we didn't know how it would work. There was nothing sure about it, but he said he was willing to take meat at any time. I told him from fifteen to eighteen thousand pounds of meat. The price was not really fixed. It was according

to what he would give. According to the quality of the meat. I don't know who said about thirty-five or forty cents a pound. I don't know if I mentioned that or he mentioned it. Chevillard, Patron and I talked about the meat almost every day. One day after talking to Hinman I saw Chevillard and Patron and told them, "We will get the meat for you." That was on Saturday, the 13th, the day Rodriguez came back from the East. I told Patron the chief steward was back from the trip and as soon as we found out how we could get the meat I would let him know. I told Chevillard the same thing. On the night of the day we first saw Mr. Hinman I saw Chevillard and Patron and told them [119] we saw the manager during the day and were talking about how to get the meat. I told whichever one I spoke to that I thought I would be able to get some meat. That is all that was said. On Wednesday in the evening, about nine or ten o'clock, I spoke to Patron first at the Normandy and told him that we were talking to the manager of the meat company and I told him we had 30,000 pounds of meat they had left on board the ship and that nobody knew about it and that we could get one truck load from the meat company and send that meat to them. I told Chevillard the same thing. The talk lasted about ten or fifteen minutes with each. There were people in the place. Chevillard was busy running the dining room and Patron was busy behind the bar. On Thursday, between seven and ten o'clock at night I asked Patron if he knows a party who could

drive a truck. It was the day Hinman told me he could not get the truck driver from the company. I spoke to Patron about the truck driver and not to Chevillard. Patron told me they had somebody on hand. He said he "might have somebody to drive the truck." Patron told me he couldn't get a truck driver so I had to look for a driver myself. I didn't look until Tuesday, the 23rd, after the bill had been signed by Brandt-Neilsen. I found a truck driver in the Hotel Espagnol, in the bar. I knew Mr. De Angury before that. I had just seen him around. He is not a truck driver but I know he could drive a truck—I supposed so. I did not go into the hotel looking for De Angury. I was looking for somebody that I knew who could drive a truck. Up to this time I had not had any talk with De Angury. He was drinking at the bar and we left the bar together and went to the Normandy Restaurant. Patron was there. Chevillard was not there. I told Patron I had found a truck driver and that this was the man. When I found De Angury he was drunk. He was having too many drinks. He was pretty close to being drunk. After I found De Angury I was in the [120] Normandy Restaurant about three or four minutes. Then we went to the truck driver's home where we were about five minutes and De Angury changed his clothes. Then Patron took us in his car to where the truck was, where we arrived about four or five in the afternoon. We arrived at the place where the truck was unloaded about eight or nine o'clock. It took us four hours

to get to Millbrae as we got stuck with the old truck twice on the road. First the battery went out and we had to get a new battery. Then something went wrong with the light. We were stopped on the road by a policeman who gave us a tag for poor lights. It was a meat company truck and it had the name of the meat company on it. De Angury drove the truck for two or three miles but he didn't know how to drive the truck. The garage man who repaired the battery got in and taught him how to operate the truck. We were following Patron.

I got the first map from Chevillard on January 22, in the evening. It was the one on the envelope. It was my envelope and Chevillard drew that plan on it. I had that envelope with me on the 23rd. When we were in the garage and they were fixing the light Patron drew a map. I didn't tell him I already had a map.

When we arrived at the place where the meat was to be unloaded there was Chevillard, Patron, Jacky, the truck driver, and myself. Jacky said where to put the meat. Chevillard, Patron, De Angury and I actually unloaded the meat. I was in the truck handing it out to the people that were on the ground and they carried it away. It took an hour and a half or two hours to unload the truck. The place was lighted inside. There was not much light on the outside. After all the meat was unloaded Chevillard was figuring how many pounds there was there. Chevillard signed a bill with Mr. Jacky and he put my name on it. It was the bill that Mr. Jacky gave to him, the receipt for the [121]

meat and Chevillard signed my name. When I came up it was already signed. I said to Chevillard, "What are you signing my name for?" and he said, "It don't make no difference." I did not tell Chevillard to either sign or use my name.

I never had any talk with Chevillard or Patron as to how they were going to pay me for the meat or when they were to pay me. The only time I ever talked with Chevillard or Patron about being paid for the meat was that they said that they would pay thirty-five or forty cents a pound, depending on the quality of the meat. I knew the price of the meat would be somewhere around four or five thousand dollars. I never had any talk with them when they were going to pay me the four or five thousand dollars or how they were going to pay me.

By Mr. Resner:

I made three trips on the Sea Perch. On the first two trips I was a chef. I met Rodriguez in New York when we were waiting for the Sea Perch. I joined that ship when she came out of the shipyards. (It was here stipulated that the witness was at the present time in jail.) I don't expect to get off easy because of what I am saying here in court. I am just willing to pay for what I did, that is all. I can't do nothing else. Before the ship arrived in San Francisco in December, 1944, I was second steward and storekeeper. The duty of storekeeper is to issue the merchandise, the meat or store and fruit and all the vegetables, to the cooks and to the army and to go through the ship stores to see what is there. Before the ship sails it is my job to

walk in the storeroom and in the ice box. I knew or had the opportunity to know just what is in the storeroom. Two days before the vessel arrived in San Francisco I approached Mr. Rodriguez with a list of what was in the storeroom. I gave him the inventory I made. He did not comment about the fact that there was a lot of meat over. This last trip he told me [122] the average of the food cost was eighteen cents a meal. When he looked over and checked my figures he did not say it was 23.05 cents a meal. I don't remember that. He told the Captain of the ship in front of me that the food cost was eighteen cents per man every meal. Two days before we got to San Francisco Rodriguez told me that he ought to make some deal to sell the meat. He did not say that I should take the meat off the ship and sell it. Nobody can take the meat off the ship unless they get o.k. from the skipper. Rodriguez told me I should make some deal to sell the meat—to see the manager of the meat company and see what we can do about it. I did not go to Rodriguez and say, "There is this meat over on the ship and we ought to take this opportunity and make some money." That was his idea, not mine. It was on Tuesday, January 16, that we called Hinman at the Heuck Company. Rodriguez called first and I called after him. After the first interview I got with Mr. Hinman, from the 17th to the 22nd, I am the only person who called up Mr. Hinman. I was with Rodriguez when he made the first call. It was from some lunch place in San Francisco near the meat company. I don't know the street or

the name of the lunch place. I called again about fifteen minutes after Rodriguez had called. As soon as they answered the phone I handed the phone to Rodriguez. I could only hear what Rodriguez was saying. He said, "We will be right there." In Hinman's office there were Hinman, Rodriguez and myself. Rodriguez opened the conversation. He say he had a business proposition and if Mr. Hinman want to go in it, it will be all right. If not, just to forget it. Then he explained to him he has 25,000 pounds of meat on board the ship and if there was any way to sell the meat. Mr. Hinman said that the company can't do that because they only supply the ship and there is no other place where they can sell the meat. Rodriguez said that if Hinman will go in on the deal he will get one-third, I will get [123] one-third and Rodriguez will get one-third. Rodriguez said he has some meat on the ship that nobody knows about and he will let the company hold so much meat and sell to some other place, some restaurants or some other place. Rodriguez said that the company will sell the meat to someone else. Hinman said, "I can't say anything now. You come back tomorrow, one of you get lunch with me and see what we can do about it." Rodriguez told Mr. Hinman to forget what we were talking about. I did not do any talking in this conversation. I did not say a word, all the talking was done by Rodriguez.

On January 17 I met Hinman at the Tadich Grill for lunch. First I phoned him to tell him I was waiting for him. Hinman gave me his phone

number on the 17th or 18th. After the first time Rodriguez went up to see Hinman he never saw Hinman again and he never talked to Hinman again on the telephone so far as I know, because he has to stand by on the ship. After the first meeting I did all the telephoning and all the visiting. I made all of the arrangements and from then on it was my idea to carry this thing through. When we left Hinman's office Rodriguez did not say that he was crazy and he didn't say that I was trying to involve him in this whole thing.

On January 18 I saw Hinman and we talked about the truck driver. Hinman said he would get the truck driver. He said he had to talk to a man he could trust. Hinman knew from the first day we met with him how we were going to sell the meat.

On January 19 I met Hinman at Montgomery and Sacramento Streets and went to the Palace Hotel with him where Mr. Hinman gave me a copy of the list. I told Mr. Hinman I wanted choice cuts of meats. He phoned his office and called out the different percentages of meat to me which I wrote down on a paper. I kept that paper. The writing on the right hand side is my writing. I kept the paper in my possession and the Federal Bureau of [124] Investigation took it away from me when I was arrested. I showed the papers to Rodriguez the afternoon of the day I got it or the next day. Rodriguez said, "Just keep on going." Mr. Hinman told me that whenever I talked with him over the phone to just say that my name was "Joe."

That was Hinman's idea. At the Palace Hotel Mr. Hinman told me to phone the next day and ask for Frank which I did. Mr. Hinman answered the phone. He said he couldn't take a chance with that man and to come to see him the next day. He meant the truck driver. On Saturday is when he told me that he would park the truck on Sansome Street; that he couldn't trust his truck driver and that I should supply a truck driver. We took a walk and he told me that is where you are going to see the truck, going to find the truck the day the meat was supposed to be delivered. I said that the bill would be on the seat. He didn't tell me that I was being followed by the FBI, or that this was dangerous business and wrong and I should drop it. On the day the meat was to be loaded on the ship I phoned Mr. Hinman and asked whether the truck and the delivery tag was where it ought to be. He told me it was on Sansome Street. On January 22 I did not have to report to the ship at any time because that was my week off. My week was not the week before. I was not supposed to be on the ship at eight o'clock on the 22nd. Mr. Rodriguez is my chief officer and I take orders from him on the ship. I never report to him. Maybe on January 22 I didn't get on the vessel until noon time. I told Mr. Rodriguez I had been in jail over night and I was in jail for three hours for being drunk. It is not a fact that on January 23 I was due on the vessel at six o'clock in the morning. On the 23rd I came on the vessel at nine or eight thirty o'clock. That is when the lady drove me down

there, left me there. It is not a fact that I did not come aboard until eleven o'clock and told Rodriguez that I had been out all night and had been drunk. I told Rodriguez that on [125] Monday and not on Tuesday. After Mr. Neilsen signed the bill I took it and personally gave it to Mr. Hinman.

Mr. Rodriguez never talked to Chevillard or Patron about the meat in front of me. Any time Rodriguez went to the Normandy Restaurant, which was almost every night, he just went there to eat. I always spoke to Chevillard and Patron because I spoke French and Patron spoke French. Patron, Chevillard and Rodriguez and I all speak English. I found the truck driver by myself. That was my idea.

By Mr. Abrams:

As soon as the meat gets on the boat it goes right into the freezer and the minute that meat off the trucks got onto the boat it went right into the freezer. The truck was driven by De Angury to Millbrae on January 23. I do not know what time the truck was put on the street by the meat company. There was no special time that I was supposed to leave San Francisco with the truck. I expected to leave in the morning or some time in the afternoon. On the 22nd I knew that the meat was to be put on the street and had to be taken away. On the 22nd I believe that around eleven or twelve or one o'clock we would take the truck away. It was between four and five in the afternoon when the truck left San Francisco. The reason for the de-

lay was that there was an Army man on the pier and we were waiting to get the pier clear. Four hours were lost on that account.

The first time I saw Mr. Jacky was that night we went to his plant about nine o'clock. I never heard of him before and never heard his name mentioned before by either Chevillard, Patron, De Angury or Rodriguez. I never heard of the Millbrae place or the storage plant before.

When all the meat was unloaded and the weights marked down Mr. Jacky indicated the total weight which I think was 17,500 pounds. After that Mr. Jacky made out a bill and asked whom to [126] charge it to. Chevillard put my name in, he indicated my name and my name was put in the bill. Jacky gave the original or a duplicate of the storage receipt to Chevillard, which showed the total weight of the meat. Mr. Jacky was surprised that there was so much meat. He said he didn't expect that much meat. I asked Chevillard why he put it in my name. I think I spoke to him in French. Down there I spoke mostly in French to Chevillard and Patron.

It was in the evening of January 22 that I first learned that the meat was to be taken to this plant at Millbrae. Chevillard told me that at the restaurant.

By Mr. Zirpoli:

(Here defendant Vincenzini stands up.)

I had never seen Mr. Vincenzini at any time before or after my arrest. I never heard him men-

tioned or discussed by anyone at any time prior to my taking the meat to Millbrae or after I got to Millbrae with the meat. I never heard his name mentioned by any person. I never saw him, never heard of him.

Redirect Examination

By Mr. Hammack:

When the ship arrived in San Francisco to the best of my recollection there was maybe 25,000 pounds of beef alone on it. Counting lamb and pork there was from thirty-five to forty thousand pounds of meat on the ship when we arrived in San Francisco. When I left Rodriguez on the afternoon of the 23rd he said, "I see you tonight." While Rodriguez was in New York I did not have any time off and was on duty every day on the ship until his return. Following his return I had about a week off, which was the week in which I was talking to all of these people. [127]

Recross Examination

By Mr. Friedman:

I arrived at the figure that there was from 35,000 to 40,000 pounds of meat on the ship because we have two boxes on the ship. One is No. 2 and one is No. 4, and when that box is full there are about 80,000 pounds of meat and that box is almost half full and that is why I figure there is 40,000. That is my estimate. When I made the inventory before I came into port I did not put the exact pounds

down for each item. I just averaged the weight to be about 100 pounds for each case. When I say there was about 30,000 or 40,000 pounds of meat there, there might have been more or there might have been less. While we were unloading the meat at Millbrae nobody said not to say anything about where the meat was or where it was stored.

I pleaded guilty in this case. I do not know that there are three charges in the indictment. I know that I am in court. That is all I know.

Exception No. 10

Q. You pleaded guilty, but you don't know how many charges you pleaded guilty to, is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross-examination, immaterial, irrelevent, and incompetent.

The Court: I will sustain the objection.

Mr. Friedman: Might I call the Court's attention to this?

The Court: I do not think it is necessary to argue this. You have made your objection and I have ruled on it.

Mr. Friedman: May we have our exception?

The Court: Yes. [128]

Testimony of George M. Kinelle for the United States.

GEORGE M. KINELLE,

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am a chef. I know Mr. Chevillard and Mr. Patron. On January 16, 1945, I had a conversation with Mr. Chevillard in the Normandy Restaurant. I talked to him in French. He was very busy that day and I sit down with Jerry, a chef, and after I sat down for the meal, Mr. Chevillard come around to see that everything is correct and then I ask to buy a small steak and I mention to him how small this steak was and he said that meat was hard to get. And I said, "I know that myself." And he said, "Well I have got some people who have some meat—some party who has some meat." He did not say how much meat and he asked me if I know somebody if he would like to buy some meat and I said, "I can find somebody to buy meat. I know chefs who might want to buy some meat." And I said, "Maybe if you have a party who has meat you can sell it to somebody who wants meat." I asked him where the meat came from and he said that was his private business, that he could not tell where that came from. He never told me where he got the meat.

He told me he would let me know. He never said how long it would be before he would let me know. I went back to the Normandy Restaurant on the evening of January 23, 1945, about eight or nine o'clock. Neither Chevillard nor Patron were there. I left a note for Mr. Chevillard. The small piece of paper you show me is the note I left. I left a note for 15,000 pounds of meat. I put the price of 75c a pound on the note.

(At this time the note was marked for identification as United States Exhibit 13.) [129]

Cross Examination

By Mr. Friedman:

I left this note on the 23rd with the lady there, the hostess. On January 16 I went to the Normandy with Jerry. I am working at the Troc, 3565 Geary Street, as a chef. On January 16 I was served a small steak at the Normandy Restaurant. When I said I bought a small steak I mean I ordered a small steak. I mentioned to Mr. Chevillard how small this steak was. Then Mr. Chevillard and I had a talk about how scarce meat was. Chevillard said that he knew some people who had meat and he asked me if I would purchase any of it. I told him I would find out. I knew everybody wants meat and I told him I would try in the Club and see if they would want to buy some. I am talking about the Chef's Club where other chefs come and eat. All the chefs talk about where they can get some meat. They ask where you can get some meat because

you can't get enough meat to run a restaurant. So I said I would take orders. Mr. Chevillard did not say that he had the meat to sell. He told me he had a party who had some meat to sell. As a result of that conversation I went up to the club and talked to some other chefs and then came back on the 23rd and left an order for 15,000 pounds of meat.

By Mr. Zirpoli:

I came back and ordered 15,000 pounds of meat. If he wanted to sell that I would bring the parties in to do business. I had no discussion with Chevillard about points for the meat. I left an order for 15,000 pounds of meat and I said if he would get it I would bring the parties there. I didn't ask about the points to pay for it. [130]

Testimony of Homer Barger for the United States

HOMER BARGER

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am a private in the United States Army and was such in January, 1945. I was on duty checking meat on the pier in Oakland on the Steamship Sea Perch, on January 23, 1945. I was checking the

meat to see if the meat was in good condition and if it was frozen good and hard and to see that the meat went on the ship before it thawed out. I did not check for the weight or anything like that.

Cross Examination

(By Mr. Friedman)

On that day I was about the pier at all times. I came when the truck loads of meat would come in and unload and I would check it and then I would go off somewhere. I went from the captain's office to the pier about 8:30 that morning and I was there off and on until there were no more truck loads of meat. I finally left about ten o'clock that night. Between truck loads I would go up to the captain's office sometimes and sometimes go on the other piers and walk around and take a smoke. I didn't know any of the people around the pier or any of the personnel of the ship. I did not know either Rodriguez or Barral. I talked to them but I didn't know them. I talked to the chief steward that morning about nine o'clock. The meat got aboard the ship within a few hours that day.

Testimony of Joseph Mancini for the United States

JOSEPH MANCINI

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows: [131]

Direct Examination

(By Mr. Hammack)

I operate a service station in the 5100 block on Third Street, in San Francisco, and was there on the evening of January, 23, 1945. The Ed Heuck meat truck did not come into the service station. It was stalled up the street aways. A man came in, in connection with the battery. I went out with him to where the truck was and brought the battery back and charged it and then went back and put it in. I drove up with the fellow to the truck in his car. I see the man in the courtroom now. (Here the witness identifies the defendant Patron.) I placed the battery in an old truck. It was a big meat truck. I did not see that man any more after I replaced the battery. He took me up to put it in. There were two fellows there—one truck driver and another man.

Cross Examination

(By Mr. Friedman)

This gentleman that I pointed out as Mr. Patron came into my place and said there was some battery trouble with the truck. This was about 6:15 or 6:30. He wanted to know if I would go up and fix it. I drove up with him in his car, took the battery out of the truck, put a fifteen minute charge in it and took it back. I brought the battery back to the service station, charged it and took it back. I took the battery back with my truck. I did not

see Mr. Patron again after he drove me back to the service station with the battery.

(Here an adjournment was taken until March 9, 1945, at ten o'clock, whereupon the following proceedings were had.)

Testimony of Sarah Hughes for the United States

SARAH HUGHES

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows: [132]

Direct Examination

(By Mr. Hammack)

In January of 1945 I was employed at the Normandy Restaurant at 1326 Powell Street, which is operated by Mr. Patron and Mr. Chevillard. I was on duty on the night of January 23, 1945. Patron and Chevillard were there around eleven o'clock on the evening of January 23. They had not been there prior to that time on that evening. I know the defendant Julio Rodriguez. He was in the restaurant on the night of January 23, 1945, in the evening around closing time. We close about a quarter to twelve. During that evening I saw a man named Kinelle. I know him. He left a note with me for Mr. Chevillard. I really do not know whether Government's Exhibit 13 for identification is the note left by Mr. Kinelle for Mr. Chevillard. I gave the note to Mr. Chevillard.

Cross Examination

(By Mr. Resner)

I do not know the first time I saw Julio Rodriguez. It was before January 23. I could not say how many times he had come into the restaurant. I think he has been there several times. I knew him as a customer. I imagine he has spent the evening there. I remember that he stayed until closing time on January 23 because I was talking to him during the evening. I had talked to him on other evenings. January 23 was kind of quiet and I spent a little time with him. So far as his presence there on the night of January 23 is concerned and my talking to him that was no different than any other time.

Testimony of Michael Sterks for the United States

MICHAEL STERKS

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows: [133]

Direct Examination

(By Mr. Hammack)

I am a sergeant in the United States Army and was on duty on the Sea Perch on her last voyage as mess sergeant. My duty was to see that the food was prepared, to have the crew in the galley in working order and our main object is to see that the troops are fed. The Sea Perch is a troop

transport. While on that ship I knew Mr. Rodriguez, the chief steward.

Upon return of the Sea Perch, at San Francisco, on December 28, 1944, I roughly examined the ship's stores so far as they pertained to the meat on the ship. In civilian life I was a merchant, meats and groceries and a municipal meat inspector working for a while in the city of Gilbert, Minnesota. I made my examination of the meat in the following manner: I went in with the second steward and just roughly, by looking at it, I have a fairly good idea. There was 45,000 to 50,000 pounds of meat left aboard the ship. I would say there was approximately 35,000 pounds of beef.

Cross Examination

(By Mr. Resner)

When this vessel came back to San Francisco I went aboard the vessel with an inspector's team from the Inspector General's Office at Fort Mason, which are approximately eight or ten officers. Rodriguez and three or four of the officers were there when I went to the ice boxes. While doing that they asked Rodriguez why he had a certain amount of meat on board the ship so long. It was packed in May of 1944, and they asked why wasn't it used before. I don't recall or did not hear what Rodriguez said. According to my estimate there was 40,000 or 50,000 pounds of meat on the ship when she returned. There were five ice boxes, two of them had meat in them. There was poultry in the ice box with the meat. When I made this estimate I did not [134] write it down nor did I

keep a check on each ice box. I just looked it over and guessed as to the amount. I did not take any inventory. I would not say that I could be mistaken in my estimate as much as 10,000 pounds. Most of the meat is in cases and it is not hard when you know that you have been using about 1,000 pounds of meat a day, you can get a fairly good idea of how much is received from time to time and how much is left. I did not know how much meat was on the Sea Perch when she left. I used the figure of a thousand pounds being used a day, which told us how much was left at the end of the voyage. I do not know how much meat was on that vessel when she first departed from San Francisco. I arrived at the figure of 40,000 and 50,000 pounds just by seeing the meat there, just by looking at it, without counting it. I had arguments with Rodriguez on this trip. I did not get along with him very well. I had nothing personal against him. The first time I discussed my testimony with the United States Attorney was approximately a week ago at which time I first discussed it with the Federal Bureau of Investigation. I was anxious to help the Government in this case.

Testimony of Thomas P. Dowd for the
United States

THOMAS P. DOWD

produced as a witness on behalf of the United States, being first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am a special agent of the FBI and was such during the month of January, 1945. On January 20, 1945, I saw Mr. Barral at Montgomery and Sacramento Streets, in San Francisco, where he was joined by Mr. Hinman. I followed Mr. Barral around the financial section of San Francisco and eventually out to Broadway, in San Francisco. He walked around the financial section with [135] Mr. Hinman for about fifteen minutes, went down to Market, up Market to Stockton, and out to Broadway, and then into several restaurants around Broadway and Powell Street. He went into the Normandy Restaurant. Later in the afternoon I saw Mr. DeAngury with him. Barral and De Angury went on Broadway above Stockton Street and then they got into a Ford automobile and drove to the Normandy Restaurant with two other men. I did not recognize the other two men. On January 23 I saw Barral and De Angury in a truck of the Ed Heuck Company, about 4:30 in the afternoon. They got into this truck and drove out Third Street and Bayshore Boulevard. I saw another man at the time I first saw them in the truck but I could not recognize him. I followed the truck. It went out Third Street on to Bayshore Boulevard and after passing South San Francisco airport made a right turn into Millbrae Avenue to El Camino Real and a left turn there, went up two blocks and then into the Millbrae Dairy Company. During this trip I did

not see any of the other defendants in this case. I saw a car that I understand belonged to one of the defendants. I did not see the unloading of the truck.

Testimony of William J. Hurley for the
United States

WILLIAM J. HURLEY

produced as a witness on behalf of the United States being first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am a special agent of the Federal Bureau of Investigation and was such on January 23, 1945. I first saw a truck with the Ed Heuck name on it when it was parked in Key Street just off to the right of Third Street just before the Junction with Bayshore. I never got close enough to the truck on its way down [136] to recognize the people in the truck. The truck ended up at the Millbrae Dairy. The first time I specifically observed any of the defendants in the case was at approximately five minutes of six when we were proceeding south along Third Street. A dull dark green car, a four door Ford, pulled out of Key Street and made a left turn into Third Street, going north as we were going south. I recognized Mr. Patron as the driver of that car. We pulled over to the right along the curb as the defendant Patron drove into a service

station down there. He was in there approximately ten minutes and he came out again and drove back to Key Street and I saw him again the second time. Then after remaining at the truck approximately five minutes or so they drove back to the service station and I saw them then the third time. The fourth time I went back I did not see him close enough to recognize him. We waited until Patron's car left Key Street and proceeded south along Third Street to Bayshore Highway and followed the car along Bayshore Highway to the turn to the right opposite to Mills Field, leading to San Bruno, and we were directly behind his car at all times along there. I pulled over to a stop sign at the juncture of that street leading into San Bruno and we passed him. We made a turn and another car which was also with us then took the first place in line. We came down and proceeded along San Bruno Avenue into El Camino Real, passed the Millbrae intersection where Mr. Patron's car turned into the Millbrae Dairy, followed by one of our other cars. Then we went back and apparently while we were making some telephone calls the car left because I took up a position opposite the Cross Roads Tavern, at Millbrae Avenue and El Camino Real. At approximately five minutes to nine the defendant's car again came by and passed about fifty feet from me and about two minutes later the truck came along and a few seconds later one of our cars followed it. It is a few hundred yards [137] north of the Millbrae Dairy where I saw the three cars turn toward the Millbrae Dairy.

I did not actually see the cars go into the Millbrae Dairy.

I was at the Millbrae Dairy when the meat was trucked up again and brought to the San Francisco warehouse. I witnessed marking the meat and loading on two trucks, and drove up to the Quartermaster's Depot at Fourth and Channel Streets where the meat is presently stored. I assisted Agent Johnson with making the inventory of the meat. I handled each package and called off the figures, examining the gross and net to be sure we weren't making any mistakes of the weight and he wrote them down as I called them. This inventory was from the meat removed from the Millbrae Dairy.

Testimony of Dallas A. Johnson for the
United States

DALLAS A. JOHNSON

produced as a witness on behalf of the United States being first duly sworn, testified in substance as follows:

Direct Examination

(By Mr. Hammack)

I am a special agent of the Federal Bureau of Investigation and was such from January up to now. I made an inventory of certain meat recovered from the Millbrae Dairy and now in storage in the Army Warehouse in San Francisco.

(The inventory made by the witness was admitted in evidence and marked U. S. Exhibit No. 16.)

The total number of pounds on that inventory is 17,832 and the total number of pieces is 321. I broke down the items into the different kinds of meat. Government's Exhibits 7A, B and C, consisting of this carton, case and sack, are part of the lot of meat as stated in my inventory. All of the similar boxes and cartons and sacks were so marked. [138]

I totaled up the weights of meat as reflected on the tag, Government's Exhibit No. 5. The total weight is 64,793 pounds. The delivery tag, Government's Exhibit No. 9, bearing the signature of Rodriguez, I totaled that up and such total weight is 64,793 pounds.

I totaled up the amounts on Government's Exhibits No. 2, the inventory, plus certain items of meat as reflected on page 9 of the inventory, which part has not been offered in evidence, and the total amount of meat in the entire inventory was 33,104 pounds. The total amount of beef was 19,584 pounds. Those figures do not include the poultry nor the meat which was contained in cans. (Here sheet 9 of the inventory was admitted in evidence as part of Government's Exhibit 2 in evidence, subject to all the objections defendants Chevillard and Patron originally made to Exhibit 2.)

Testimony of Ronald A. Wilson for the
United States

RONALD A. WILSON,

produced as a witness on behalf of the United States,
being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am a special agent of the Federal Bureau of Investigation. In such capacity I talked to the defendant Chevillard in this case at the San Francisco field office of the Federal Bureau of Investigation on the early morning of January 24. A special agent, by the name of Lee M. Fallaw was present. At that time I took a statement from Mr. Chevillard and also took from him some papers and notebooks. The document you show me dated January 24, 1945, is the statement taken from Mr. Chevillard on that date. Each page is signed by Mr. Chevillard. [139]

Exception No. 11

Mr. Hammack: At this time we will offer this statement in evidence as against Mr. Chevillard only.

Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it?

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be admissible on one count and not admissible on the other.

The Court: All right.

(The statement of Fernand Chevillard was marked U. S. Exhibit 18.)

That notebook I took from Mr. Chevillard, he had it in his possession at the time he was interviewed at the San Francisco field office, on January 24, 1945. The carbon copy of a receipt of the Chip Steak Company, Pierre Barral, 415 Jones Street, was in Chevillard's billfold at the time he was questioned. The paper bearing the name of A. Vincenzini, 540 San Antonio [140] San Benito, Telephone SB-87, was found in Mr. Chevillard's topcoat pocket at the time he was at the San Francisco field office on January 24. Government's Exhibit 13 for identification, was found inside of the notebook. When we got to the

San Francisco field office I asked Mr. Chevillard if he minded if we went through his pockets to see what he had on his person, his pockets were emptied out on the desk in the room there and that is how we acquired possession of these items, the notebook, the receipt and the address.

(The notebook was marked U. S. Exhibit 19; the Chip Steak receipt was marked U. S. Exhibit 20; and the address was marked U. S. Exhibit 21, all in evidence only against the defendant Chevillard.)

The statement of defendant Chevillard, U. S. Exhibit 18, reads as follows:

“January 24, 1945
San Francisco, California

I, Fernand Chevillard, hereby make the following voluntary statement to Special Agents Ronald A. Wilson and Lee M. Fallaw of the Federal Bureau of Investigation, first having been told by them that I have the right to have an attorney, that I do not have to make any statement and that any statement I do make may be used against me in court. No threats or promises have been made to me and no inducements have been offered me. I have known Pierre Barral for about six months. He would come to the Normandie Restaurant to see me and my partner, George Patron. I knew that Pierre Barral was a chef on ships. About two or three months ago Barral offered to sell me some meat off his ship, but I did not buy any. For the past ten days Barral has been coming to the Normandie Restaurant from

his ship. About Thursday or Friday, [141] Jan. 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship. Barral offered to sell me 15,000 lbs. of New York Cuts, Filets, rib and lamb at 40c per pound. He said he wanted to sell the whole 15,000 lbs. at the same time. I told him I was broke and couldn't buy the meat, but that I would inquire around to see if I could find anyone to buy the meat and I told Barral I would also try to find a place for the meat to be stored. Every day after that Barral asked me if I had found anyone to buy the meat or if I had found a place to store it. Barral told me he would have the meat in a truck and we had nothing to worry about except to find a place to store the meat. George Patron was present when Barral made this statement. This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself. We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction. After having discussed the matter with Barral I made inquiries of several persons as to whether they would be interested in purchasing this meat. I also made inquiries regarding refriger-

ator space to store the meat. Angelo Vincenzini, a butcher who lives at 540 San Antonio Ave., Lomita Park, Calif., told me he thought I could get storage space for the meat at Millbrae Dairy and then advised me there was [142] storage space there which I could get. That night at the Normandie Restaurant I told Barral and Patron there was storage space available. Barral said the truck driver didn't want to come and I said "the deal's off" because I realized the deal was wrong. Barral had told Patron and me that the meat belonged to the Merchant Marine. On Jan. 23, I was at 35 Lake St., when I got a phone call about 4:30 p.m. from Mrs. Patron, who said George Patron had told her to get in touch with me by any means possible and tell me to go to Millbrae. I then drove to Millbrae in my car and saw Mr. Jacky of the Chip Steak Co., who has the Millbrae Dairy. I told Mr. Jacky I had come for the storage space that Angelo Vincenzini had talked to him about. I then waited for the truck with the meat to arrive. I knew that George Patron would accompany the truck. Between 8:30 and 9:00 P. M., Patron came in his car to the refrigeration plant. Barral was in the truck with its driver, Lucian, whom I know by sight, when it drove up at the same time. Mr. Jacky was the only other person present. Patron, Barral and the truck driver unloaded the meat from the truck while I checked the weights of the meat with Mr. Jacky. I kept a record of the weights in my address book, notations indicating the total weight of the meat was 15,875 lbs. After the truck was unloaded Mr. Jacky asked me in whose name

the receipt should be made and I told him Mr. Barral. The copy of the receipt was given to me instead of to Mr. Barral as Mr. Barral was absent changing his clothes at the time. However, the receipt would probably have been given me anyway, so I could get the meat for a purchaser if I had decided to go through with the deal, as Mr. Barral was leaving town in a short time. I paid Mr. Jacky \$30 [143] of my own money on account for storage, which was to be at one cent a pound per month, and we agreed to settle the balance the next day. I made these arrangements with Mr. Jacky. The receipt was turned over by me to Special Agents Wilson and Fallaw on Jan. 24, 1945. I also turned over to them my notebook showing notations I made checking the meat off the truck. After the truck was unloaded I told the others that I would see them later and drove back to San Francisco alone in my car. I have not discussed the meat with anyone since that time. I got back to the Normandie Restaurant about 11:00 P. M. The hostess, Mrs. Sarah Hughes, gave me a slip of paper on which was written 'Order for 15,000—about 75'' and which bore the signature of George, the chef at the Troc, a night club on Geary Blvd. I had discussed the meat with George and told him I knew where he could get meat, and I took this note to mean he would buy 15,000 lbs. of meat at 75c a lb. The price indicates to me that he wanted filets or New York cuts. I had also talked to Angelo Vincenzini and told him he could probably get some of this meat at 40c or 50c per pound. He said he might be interested in buying some of the meat

later. I told Angelo Vincenzini all about the meat and where it was coming from and how it was being obtained, and he said he wanted to stay out of jail. This was on Monday, Jan. 22, 1945. During the past five or six days I mentioned this meat to several other chefs, whose names I do not know, thinking they might want to buy some of the meat.

I have read this statement on five pages and it is true.

FERNAND CHEVILLARD.

Ronald A. Wilson, Special Agent, FBI—1/24/45.

Lee M. Fallaw, Special Agent, FBI, San Francisco, California.” [144]

Cross Examination

By Mr. Friedman:

The paper signed by Mr. Chevillard was written by Special Agent Fallaw. I did not write any part of it. The statement was taken on the early morning of January 24, 1945, between the hours of 2:30 and five o'clock. Mr. Chevillard was taken into custody at about 1:10 at the Normandie Restaurant and was removed from there almost immediately to the San Francisco Field Office of the Federal Bureau of Investigation, where he was kept until 5:30 in the morning. The statement was signed probably about five o'clock in the morning. I did most of the questioning of Chevillard. I spoke to him in English and had no difficulty in understanding him and he had no difficulty in understanding me. The me-

chanics in taking the statement were that I questioned him and then we would decide on how he wanted to say each thing and that was put into the statement. I would question him and he would answer and sometime his answer was not in a form that would go down and we would have to straighten it out—I mean we would have to ask him some questions so as to get his statement, that is his answers were not responsive at all times. We did not have a stenographer there and nobody took down the questions and answers stenographically or with a machine nor was there anything to preserve a record of what was actually said or done. Sometimes his answer would be long and rambling and sometimes it was not responsive to the question and we would have to ask the same question several times before we got a responsive answer. On other times we thought his answers was immaterial to the question that had been asked. There probably were questions that were asked and do not appear and there were answers given that do not appear in the statement. He gave several explanations when we were asking him about things pertaining to Barral [145] and to the meat. It took us from about 1:30 until five a. m. to acquire the information from Mr. Chevillard that appears in this document. It took approximately 3½ hours. Mr. Chevillard did not tell us that he understood he had the right to have a lawyer. He was told that. He did not use the words that he was willing to make a free and vountary statement. We asked him, we told him we would like to ask him some questions about this matter. He

was asked if any threats or promises had been made against him or to him. We had not made any. You usually include that in the statement. I asked him if any threats or promises had been made to him and he said no, that was at the time the statement was being made. The statement was not being written during the whole 3½ hours. It was not being put on paper. We started to write the statement when we thought that Mr. Chevillard was giving us the information that was true. He did give information that I did not think was true. It consisted mostly of denials on his part. He first denied that he had any dealings with Barral outside of the fact that he had gone out to get the refrigerator space for him. He made that denial just once. He denied that he was going to profit on the sale of this meat or from this transaction. He denied that he was going to receive any of the meat. He denied that there had been any agreement between himself and Barral. In fact he denied almost every question we put to him first. He made these denials for about an hour. That is, up to somewhere around half past two. He did not deny that he knew where the meat was supposed to come from or go to. During the first hour he said that he knew it was meat that was to go to Barral's ship, and that it was going to be put on a truck and that Barral was going to get a truckload of meat. During the first hour Mr. Chevillard said that he did not have the money to purchase the meat. He did not say that he never agreed to purchase it or never intended to [146] purchase it. We asked him whether or not he intended to buy the meat and his reply

was that he did not have the money to buy the meat, that Barral wanted to sell all the meat at one time and he did not have the money to buy it. He told us he knew Barral about six months, that Barral had first come to the Normandie Restaurant about six months previous to the time we talked to him. He said that two or three months previous Barral had approached him about selling him some meat from his ship and that he told Barral he could not use any.

To a certain extent the words used in this written statement are the words used by Mr. Chevillard. I thought he spoke English quite well. He does talk a little broken, yes. This statement really is edited. It was put in a form so that it will read. It purports to be the substance and not the words of what Mr. Chevillard told me—there are some exact words there and some different. When I first questioned Chevillard about Barral first offering to sell him some meat his reply was he could not use any. If it says in the statement “I did not buy any” then he said he did not buy any. I asked him why he did not want to buy any of the meat and Chevillard said he couldn’t use any. I did not ask Mr. Chevillard if Barral had explained to him how he was going to get the meat off the ship to sell it.

Q. Let me call your attention to this particular language which appears on page 2 of the statement:

“This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron, and myself.”

Q. Are those Mr. Chevillard’s words?

A. I believe he agreed to that statement, in that form.

Q. Isn't it a fact that you had quite an argument with him about the word "agreement" [147]

A. There was some talk about it.

Q. Well, now, what was said about it?

A. He wanted—he said he did not like the word "agreement," and we asked him what he would call it, and he said it was a deal. He said he did not like the word "agreement," and we asked him if it was not true that they had agreed to do this, and he said yes. We said, "Isn't it true that it would be an agreement?" And he said, "Yes," he understood it would.

There was some discussion about the word "agreement" and it was finally agreed by Mr. Chevillard that it was an agreement. I would not say we argued with him. We asked him further questions to try and determine if this was not an agreement. At first Mr. Chevillard did not want the word "agreement" used. Afterwards we agreed that it was an agreement. I asked him if he did not think that it was an agreement and he answered that he thought it was.

Mr. Freidman: Q. I will call your attention to this portion of the statement: "About Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 lbs. of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the

trip and wanted to sell 15,000 lbs. of it before it was put on the ship."

Did you ask Mr. Chevillard whether or not Barral's conversations were with Chevillard and Patron together, or separately? A. Yes.

Q. What reply did he make?

A. He said he talked to both of them. They were both there at times, and sometimes Barral talked to Patron, and sometimes to Chevillard.

With reference to these statements relative to conversation with Barral I do not recall which conversations took place [148] solely between Barral and Chevillard. When I took Chevillard in custody shortly after one o'clock on the morning of the 24th I told him what he was being arrested for. I told him he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company. I don't recall if I told him anything else relative to the nature of the charge against him. I did not tell him he was being arrested for helping to steal the meat or for helping or causing to be made false statements to the War Shipping Board. I did not tell him he had been arrested because he had made or used or caused to be made, or caused to be used a trick or scheme to conceal a material fact from the War Shipping Board or the War Shipping Administration. I believe we did tell him that the charge against him would be conspiracy to defraud the government. Chevillard did not ask and we did not tell him who he was supposed to have conspired with.

During this 3½ hours, while I was questioning Mr. Chevillard, there were no notes taken. I ques-

tioned Chevillard as to what he was going to get out of this transaction and he said there had been no agreement as to what he was going to get. Later he said that he expected to profit from the transaction in some manner. I asked him how, and he said he didn't know for sure whether or not from the purchaser, but in some way he expected to gain from it. There was quite a lot of discussion about that matter, probably fifteen minutes.

Q. Well, taking your figure of fifteen minutes, it is all summed up, is it not, in these words in the statement as follows: "We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction." Is that right? [149]

A. That is the summation of what he told us.

Q. That is the summation of fifteen minutes' worth of conversation?

A. That is the summation of what I told you. I don't know how long the conversation lasted.

Q. Now, you have this statement here: "Angelo Vincenzini, a butcher who lives at 540 San Antonio Avenue, Lomita Park, California." He told you that he was a butcher that lived in Lomita Park?

A. I think we looked up the exact address and asked him if that was the fellow. I am quite sure that was the way it was.

Q. You looked it up where?

A. In the telephone directory.

Q. And you asked him if that was the address?

A. He had the slip of paper with the telephone number on it, and he said that was the fellow.

Q. So that he actually didn't tell you that Mr. Vincenzini lived at 540 San Antonio Avenue, Lomita Park, California, did he?

A. He said that was the Mr. Vincenzini that he had talked to.

Q. On the bottom of page 2 you have this statement: "Barral said the truck driver didn't want to come." Did you ask him what truck driver he was talking about?

A. No, I don't believe we did.

Q. You didn't ask if it was the truck driver of Heuck that didn't want to come?

A. No.

Q. You didn't ask if it was the truck driver that Barral had procured that didn't want to come?

A. No, sir. [150]

On the top of page 3 of the statement it says, "And I said, 'The deal's off' because I realized the deal was wrong." Mr. Chevillard said that the deal was off and he was asked why he said that, he said that he did it because he was becoming worried about the matter and he was asked if he was worried because he knew the deal was wrong and he said "Yes." The reason I didn't put it in the statement is, it is not supposed to be a word for word question and answer statement, that is the substance of the conversation that took place. We discussed with Mr. Chevillard as to what should go in and what should be left out of the statement. We told him that it was

his statement and that we wanted to get the facts as clear as we could in there, and before something was written down it was restated and asked if it was all right and that is the way he wished to say it. We did not discuss with Mr. Chevillard what should be left out of the statement, of the things he told me in those 3½ or 4 hours. Mr. Chevillard told me what is contained in the statement as "Barral had told Patron and me that the meat belonged to the Merchant Marine." I didn't tell Chevillard that he was wrong that the meat didn't belong to the Merchant Marine, but that it belonged to the War Shipping Administration.

Q. Isn't it a fact what you asked Mr. Chevillard was, "Did you know where the meat was supposed to go?" And he told you Barral told him it was to go to the Merchant Marine?

A. No, sir, I don't think that was the way it was.

Q. You don't think—do you know?

A. Yes, sir.

Q. You have no notes?

A. I recall quite well that point, and that wasn't the way it was.

In reference to that portion of the statement which says that Mr. Chevillard received a phone call while at [151] 35 Lake Street, in which Mrs. Patron told him to go to Millbrae. We had a discussion about that. Chevillard said there was nothing said as to why he should go to Millbrae, that he knew why he should go to Millbrae. I didn't put that in the statement. Chevillard did not say that he started to keep a check of the meat that was being stored at Millbrae

and when he found out it had Government marks, a thing he never knew, that he stopped keeping the record. I do not recall of Chevillard saying that the reason he paid Mr. Jacky \$30 was because Barral said that he had no money with him and asked Chevillard to advance the \$30 for him to pay on the storage. The words in the statement, "The receipt was turned over by me to Special Agents Wilson and Fallaw on January 24, 1945," were not a statement made by Mr. Chevillard. It was put in the statement and he agreed to the statement after it was put in. He read the statement over and said it was true and signed it. After Chevillard signed the statement he was taken to the City Prison and booked. He was taken from the Special Field Office between 5:15 and 5:30, and brought to the City Prison around 5:30 or six o'clock in the morning. There was no further conversation. The statement was signed and I was satisfied.

Redirect Examination

By Mr. Hammack:

Mr. Chevillard read the statement before he signed it. During the 3½ hours he was there we asked him if he wanted something to eat and he said he had just finished his dinner when we had apprehended him. We sent out for some sandwiches and milk. He said he wasn't hungry but he did drink the milk. [152]

Testimony of Herbert W. Schroeder for the
United States

HERBERT W. SCHROEDER,

produced as a witness on behalf of the United States,
being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am Supervising Special Agent for the Pacific Telephone Company.

(It was then stipulated that the records of the telephone company showing listings of the South City phone numbers 221 and 83 and San Bruno 87, were in the name of the Palace Meat Company and that A. Vincenzini had signed the cards placing the phone number; that they are so listed in the phone book and that Mr. Vincenzini is one of the owners of the Palace Meat Market; that the phone number Millbrae 727 is listed under the Chip Steak Company and Mr. Jacky is the manager; that Exbrook 9664 is the listing of the Normandie French Restaurant and that the listing was signed by Fernand Chevillard.)

Thereupon an adjournment was taken until March 13, 1945, at ten o'clock, whereupon the following proceedings were had:

RONALD A. WILSON,

recalled as a witness for the United States, testified in substance as follows:

Direct Examination

By Mr. Hammack:

Mr. Fallaw was a special agent of the Federal Bureau of Investigation. He witnessed U. S. Exhibit No. 18 in evidence. At the present time he is in Washington, D. C., on official business and has been there for about four weeks. He will not be back for a matter of weeks. [153]

Cross Examination

By Mr. Friedman:

During the taking of Chevillard's statement there was present Mr. Fallaw, Mr. Chevillard and myself. During the statement Mr. Trichak was in two or three times and I think Agent Lyons brought some food in. None of these other agents besides Mr. Fallaw and myself questioned Mr. Chevillard. During the four hours I stepped out a couple of times and was gone two or three minutes at a time.

GEORGE EDWIN GOODWIN,

recalled as a witness on behalf of the United States, testified in substance, as follows:

Direct Examination

By Mr. Hammack:

I was down at the Millbrae Dairy about January 23 or 24, 1945, and was present when certain meat was recovered by Mr. Heuck of the Heuck Meat Company and agents of the FBI. That meat was

stored at the Millbrae Dairy. I took pictures of some of the meat showing the position it was in and where it was stored. Mr. Jacky pointed out the meat. The picture you show me was taken by me and truly reflect the condition of the meat at the time the picture was taken. The pictures were taken in the Chip Steak Company.

(Here five pictures identified by the witness were admitted in evidence as U. S. Exhibits 8B, 8C, 8D and 8E.)

Cross Examination

By Mr. Abrams:

I went to the Chip Steak Company on January 24, at 12:45 a. m. The meat was stacked right up at the entrance of the freezer, at the front part just as you came in at the door. As far as I could tell the place was a regular cold storage [154] plant—just like the National Ice & Cold Storage plant only smaller. All that acreage down there upon which this plant is situated is known as the Millbrae Dairy. It is a regular going dairy and this storage plant is situated on the property. It is a separate entity.

Testimony of Leslie W. Roberts for the
United States

LESLIE W. ROBERTS,

produced as a witness on behalf of the United States,
being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am an auditor with the United States Maritime Commission which audits for the War Shipping Administration. Ships operated by the War Shipping Administration, through general agencies, all of the accounts, expense accounts, invoices and all extras, pertaining to the operation of such ships are audited by the War Shipping Administration.

GEORGE HALSTEAD,

recalled as a witness for the United States, testified in substance as follows:

Direct Examination

By Mr. Hammack:

Rodriguez returned from New York or from the East on Saturday, January 13, 1945. Referring to Government's Exhibit 10, I cannot read the printing that is on there in red ink. I have the stamp that was placed on there. It is identical in language with the stamp appearing on Exhibit 10 .

(Here the witness made an impression of the rubber stamp on another piece of paper which was admitted in evidence as part of U. S. Exhibit 10, subject to the same objections made by [155] defendants to the admission of said Exhibit 10.)

Mr. Hammack: At this time, may it please your Honor, I offer in evidence the following exhibits

heretofore entered against the defendant Rodriguez alone, against all other defendants, being Exhibit 1, which is a contract between the War Shipping Administration and the United Fruit Company; Exhibit 2, Steward's Account of Stores; Exhibit 3, the order for meat from the War Shipping Administration to the Ed Heuck Company; Exhibit 4, Memorandum showing percentage of meat cuts; Exhibit 5, Delivery tags signed by Brandt-Neilson; Exhibit 6, Memo by Hinman of load on truck; Exhibits 7-A, 7-B and 7-C, being wooden box meat, carton meat and sack meat; and Exhibit 9, the tags signed by defendant Rodriguez. I offer those as against all of the defendants.

Exception No. 12

Mr. Friedman: On behalf of each of the defendants, Chevillard and Patron, I object to their admission in evidence, Exhibit 2, which is the inventory, I understand was prepared by Mr. Rodriguez at the conclusion of the trip in December on the Sea Perch. I object on the ground that it is an act, transaction and event occurring out of the presence of either of these defendants and which is not binding upon them. There is no evidence they had any knowledge of any such inventory of its preparation or delivery.

I understood Exhibit 3, which is the order for the meat to the War Shipping Administration from the Ed Heuck Company, is included, and I offer the same objection on the same grounds. But so far as these defendants are concerned this is a matter of

total strangeness to them. They did not participate in it. It was not called to their attention, nor was it authorized or directed by them and it is not in any way binding on them. [156]

Likewise, Exhibit 4, the memorandum showing the percentage of meat cuts. That was the memorandum supposed to have been prepared by Barral and Mr. Hinman at the Palace Market sometime after the 16th day of January. We object to that on the grounds already specified in our objections to the other exhibits.

Likewise, we object to the introduction in evidence of Exhibit 5 against either of these defendants. I understand that is the delivery tag signed by Mr. Brandt-Neilson which Mr. Hinman testified he placed on the truck parked on Sansome Street.

The Court: Just state the objection.

Mr. Friedman: We object on the ground that these things are acts and transactions occurring out of the presence of the defendants and there is no evidence connecting them with it in any way, shape, manner or form; and they are not binding upon them. The same objection goes as to Exhibit 6, the list of meat given to Heuck and Exhibit 9, the tags signed by Rodriguez. We object to each one of these on all the grounds heretofore specified and on the additional ground it is not part of the *res gestae* on any action established against them here as against the defendants Patron, Chevillard, either or both of them.

The Court: I will admit all the exhibits against

all the defendants. Will this conclude the Government's case,

Mr. Hammack: I have others to offer, but this will conclude the Government's case.

The Court: After you have offered them?

Mr. Hammack: After I have offered them and exhibited them to the jury. I think some I will read to the jury as being the fastest method of proceeding, and others I will show to the jury as being the fastest method of proceeding. [157]

The Court: I will admit them in evidence subject to the motion to strike as regards the defendants Jacky and Vincenzini.

(Thereupon United States Exhibits 1, 2, 3, 4, 5, 6, 7-A, 7-B, 7-C and 9, formerly marked for identification, were admitted in evidence as to all defendants.)

Mr. Hammack: At this time, may it please your Honor, I offer in evidence as against the defendants Jacky and Vincenzini alone the exhibits being in evidence already against all other defendants.

Mr. Friedman: May I have the understanding, your Honor, that as to the defendants Chevillard and Patron, we have an exception to your Honor's ruling admitting each one of these exhibits in evidence?

The Court: Yes, you may have your exception.

Mr. Hammack: Exhibits 10, 10-A and 10-B, being the weights and recapitulation from the National Ice & Cold Storage Company, as testified to by Mr. Lord, previously in evidence against all

defendants except Jacky and Vincenzini, at this time I offer as exhibits against all defendants.

Mr. Friedman: They have been admitted against all the defendants?

Mr. Hammack: All the defendants except Jacky and Vincenzini.

The Court: I will admit them subject to motion to strike.

(Thereupon Exhibits 10, 10-A, and 10-B were admitted to evidence as against all defendants.)

The Government Rests

The jury having been excused, the defendants Chevillard and Patron severally made the following: [158]

MOTIONS TO STRIKE OUT EVIDENCE AND EXHIBITS

Mr. Friedman: Your Honor at the trial admitted certain testimony subject to a motion to strike, and first with the Court's permission I am going to move to strike a great part of this testimony.

Exception No. 13

The first motion that I make is to strike out Government's Exhibit No. 1. That is the contract between the War Shipping Administration and the United Fruit Company. I move to strike that out on the ground that it is an act occurring between the parties named in this contract, an act, an event that occurred long prior to any of the things alleged in this indictment, and which, of course, and which

occurred between parties who are not involved in this case, and clearly an act and transaction over which the defendant had no control and had no knowledge, and I move to strike that contract out from the evidence so far as my two defendants, Chevillard and Patron, are concerned.

Does your Honor wish to rule as I go along?

The Court: Is that motion submitted, then?

Mr. Friedman: I submit that motion.

The Court: I will deny that motion.

Mr. Friedman: We take an exception.

The Court: You may have an exception.

Exception No. 14

Mr. Friedman: The first witness that was called by the Government was Mr. Halstead. Mr. Halstead testified he was port steward. He testified as to the receipt from Mr. Rodriguez of an inventory, a requisition that was filed by Mr. Rodriguez as chief steward at the conclusion of the trip of the Sea Perch on December 28, 1944. [159]

I move to strike out the testimony of Mr. Halstead so far as it relates to the defendants I represent on the ground that, first, such testimony, including any inventory, is immaterial and incompetent as to any issue raised by this indictment, and certainly does not tend in any degree to establish the guilt of the defendants or any element of the charge against them.

Secondly, on the ground that those are acts, transactions and events occurring out of the presence of the defendants and prior to the time that

any evidence in this case would establish any concert of action or criminal activity on the part of any of these defendants, particularly the two that I represent, on any count of this indictment. And that evidence fails to establish that even if my two defendants should have, in the course of this proceeding, sometime between the 16th and 24th of January participated in any act on which they might be convicted under any portion of this indictment, there is certainly no evidence that they ever had any knowledge of the filing of any inventory or the making of any requisition by Rodriguez to the United Fruit Company. The only thing in this case about any orders or inventories which by any stretch of the imagination could be attributed to Patron or Chevillard is the testimony of the ordering that was done somewhere along about the 18th or 19th of January, with Mr. Hinman, of the Ed Heuck Company. There is nothing to show that this inventory, or anything connected with it, was ever brought to the attention of the defendants at any time during this transaction, or that they had anything to do with it. I move to strike out the testimony of Mr. Halstead on direct examination and cross-examination relating to that fact, and likewise Government's Exhibit 2, which is the inventory that was introduced under that testimony.

The Court: I will deny that motion. I will say to you, Mr. Friedman, so you will understand what I have in mind, that [160] I feel that testimony that is now in, that was subject to the motion

to strike, was properly admitted in evidence. However, I do not want to foreclose you from the right of making the motions. There may be some other motions you have in mind that you can make for the record.

Mr. Friedman: That is what I am going to do. I am satisfied your Honor would not admit them unless you thought they were admissible, nevertheless in recounting these matters again your Honor might see that you were mistaken in some instances, as I feel your Honor was.

The Court: The last motion I will deny and note an exception.

Exception No. 15

Mr. Friedman: I will turn now to the testimony of Mr. Barral for a moment, and I have certain motions to strike in that regard.

Your Honor recalls that the testimony of Mr. Barrall was to the effect that sometime before they came to port he had a conversation with Mr. Rodriguez in which Mr. Rodriguez said that he had a certain quantity of meat in the ship, and that he wanted to sell it to some meat company. We objected to that conversation on the usual and customary grounds as to such conversations, and I now move to strike it out upon these particular grounds.

First, that it is not binding on either of these defendants, and that it is an act, a transaction, a conversation occurring out of their presence, and

that they never authorized or ratified it so far as the evidence in this case is concerned.

Secondly, it does not tend to prove any charge or element of the charge set forth in this indictment, and therefore is incompetent and immaterial for this reason. The charge set forth in the indictment or the case of the government rests upon this proposition. The Government contends that the fact that Mr. [161] Rodriguez in some manner had succeeded in accumulating some fifteen thousand or twenty thousand pounds of meat, and that by means of making some sort of a false inventory this meat was there, but still nobody knew it was there, and that as a result thereof Barral conceived the idea of getting some meat company to divert in some manner an equal quantity of meat, and then by putting a less amount on board the corrected inventory would show the total amount that should be there. But the conversation that occurred between Barral and Rodriguez, while they were at sea, was not in support of such plan or scheme. Barral's testimony is that Rodriguez at that time, in making these statements, wanted to sell the meat to a meat company, and Barral's testimony as to the first detailed conversation with Mr. Hinman on January 13, or whenever it was, the 14th or 15th, the first conversation with Mr. Hinman, his testimony is clearly to the effect that at that time Rodriguez did ask Hinman if he would buy the meat that they had on the ship. That is certainly no part of any plan or scheme that the Government is relying upon in this case,

and these matters and things occurred out of the presence of the defendants, and even if we assume for the purpose of this argument that subsequently Chevillard and Patron did some act or acts which would make them a party to the conspiracy charge contained in the third count of the indictment, nevertheless there was nothing in that unlawful scheme, as claimed by the Government, to sell this meat to the meat company, as an element thereof, and they never had any knowledge of it, and therefore adopted it, and never became a part of the conspiracy charged in the indictment, and therefore we say that the conversation testified to by Barral, as between Barral and Rodriguez, while they were at sea, related to meat in the ship's stores; and the conversation had by Barral and Rodriguez with Hinman on the occasion of the only time that Hinman ever spoke to Rodriguez has no bearing in [162] this case so far as these defendants are concerned, and I move that each of these conversations be stricken from the record.

The Court: I will deny this motion, too, and you may have an exception.

Exception No. 16

Mr. Friedman: Likewise, I move to strike out the testimony given by the witness Hinman as a conversation and telephone call had by him with Barral on January 17, 1945, at the Tadich Grill. The witness testified as to Barral wanting a list of the supplies that had been ordered for the Sea Perch. I make the motion on all the grounds that

I made the other motions on, that it is an act, transaction, conversation which the defendants neither heard, or ratified or approved, out of their presence and not binding upon them, and not within the issues of any count of the indictment.

Likewise, I move to strike out the testimony of the witness Hinman as to a conversation had on January 19, 1945, between him and Barral, held at the Palace Hotel, relative to the choice cuts of meat, and the memorandum evidence of the choice cuts of meat prepared by Mr. Hinman and Mr. Barral, upon all of the grounds upon which I moved to strike out the other testimony; that includes Exhibit 4 introduced by the Government.

I likewise move to strike out the testimony of the witness Hinman, given as to January 20th, in which he testified that it was his suggestion to Barral to leave the truck on Sansome Street, and in which he showed Barral where the truck would be located. I move to strike that out on all of the grounds I moved to strike out the testimony relating to the 17th and 19th of January.

Likewise, the testimony of Hinman as to January 22, in which he told Barral that the bill would be on the seat of the [163] truck, and in which testimony also appeared a telephone conversation from Barral to Hinman, relating to arrangements being made for the receipt, and likewise the testimony as to January 23 given by Hinman, wherein he testified at 3:40 p. m. Barral came to his office and gave him a receipt for all of the meat on the truck, which visit of Barral was preceded by a

telephone call with respect to where the truck was, and where the delivery would be made. I move that each of those conversations in the testimony be stricken on the ground they are not binding on either of the defendants Patron or Chevillard, that they form no part of the plan or scheme set forth in the indictment, that they certainly do not become material in considering either Count 1 or Count 2, that they were not within the presence of the defendants and each of them, and they are not binding upon them.

The Court: The motion as to the striking of the testimony of Hinman will be denied and an exception noted.

Exception No. 17

Mr. Friedman: Now, on the same grounds that I moved to strike out the testimony of the witness Hinman I move to strike out the testimony of the witness Barral which was his version of the conversations and transactions that occurred between Barral and Hinman on January 17, 19, 22 and 23, and of course it is based on identically the same grounds that I moved to strike out the testimony of Mr. Hinman.

The Court: The Court will make the same ruling and an exception may be noted.

Exception No. 18

Mr. Friedman: Now, referring to the testimony of Brandt-Neilson, I move to strike out the portion of Brandt-Neilson's testimony in which he testified

that on or about January 22, in the room of Mr. Rodriguez on board the Sea Perch he had a [164] conversation with Mr. Rodriguez in which Mr. Rodriguez discussed with him the question of economy and waste on ships, and that if stewards did not indulge in so much waste there would be a great deal of saving to the company in meat, and in which conversation he further stated that Mr. Rodriguez stated that he had a large amount of meat and had gone around to see the manager of a meat company, and that the meat company had ought to pay him, or that he could sell the manager of the meat company, and then your Honor will recall Mr. Brandt-Neilson testified there was some mention of a hundred dollars, but that he could not make out what it was all about; he did not know whether he was to get it or somebody else, or who was either to pay it or receive it. I move to strike out the testimony on the ground it certainly has nothing to do with the defendants in this case and does not tend to establish any essential element of any count of this indictment, and it is certainly not binding on either of these defendants; that was a conversation occurring out of their presence, and there was no evidence that they had any knowledge thereof, that they ever authorized or sanctioned the making of such statements by Mr. Rodriguez, or that they were subsequently apprised thereof, or it was ratified or confirmed by them in any way.

The Court: The same ruling and the same exception.

Exception No. 19

Mr. Friedman: I move to strike out the testimony of Mr. Hamburg, who testified, as I recall it, that he was the chief checker, and that he was present and talked to Mr. Rodriguez, in which conversation Mr. Rodriguez signed a sheet showing that a certain amount of meat had been delivered to the Sea Perch. You will recall on January 23rd he testified, Mr. Hamburg did, that he prepared that tag for signature, and that he requested Mr. Rodriguez to sign it, and that Rodriguez signed it upon his [165] statement that there was that amount of meat that had been delivered. Certainly that is not an act in furtherance of the conspiracy, and it certainly is not an act that is involved in Count 1 or Count 2 of the indictment, because under this witness' own testimony, Mr. Hamburg's own testimony, Rodriguez signed upon his representation this tag for the United Fruit Company, and he, as the Government contends, is the agent and the alter ego of the War Shipping Administration, and procured the signing of this tag by Mr. Rodriguez. It is certainly not a false statement as outlined by Count 1 of the indictment, and it is certainly not a trick or scheme to cover up that fact. I can conceive that if this tag had been given to the Chief Clerk and prepared by Rodriguez and signed by him and given to the Chief Clerk, that there probably would be some basis for the assumption that Rodriguez knew it was false and was filing it for the purpose of concealing facts from the War Shipping Administration, but such is not

the evidence in the case. This is the Government's own evidence, that is not ours, and the Government's own proof has established that the tag was not prepared by Rodriguez upon the representation of an agent of the War Shipping Administration that that amount of meat had been placed on the ship, and that it was a routine matter, that these things were done in that way at all times. So I move to strike out the testimony and the tag (Exhibit 9) signed by Rodriguez on the ground that it does not prove or tend to prove the elements of the offense set forth in Count 1 of the indictment; that it does not prove or tend to prove the elements of the offense as set forth in Count 2, and does not prove or tend to prove the offense set forth in the third count of the indictment; and upon the further ground that it was a transaction outside of the presence of these defendants, which they had no knowledge of prior to or subsequent to the time of its commission, and they never [166] authorized, ratified or confirmed or had any knowledge thereof.

I will submit that motion.

The Court: The motion will be denied and an exception noted.

Exception No. 20

Mr. Friedman: I move to strike out the testimony of the witness Sterks, in which he gave an opinion and conclusion that on a certain day he looked through the stores in the storage boxes of the Sea Perch, and as a result thereof said as a

conclusion that there were some 35,000 or 40,000 pounds, in one instance, and in another instance said there were between forty-five and fifty thousand pounds of meat, on the Sea Perch; that was plainly the opinion and conclusion of the witness, and it is certainly not binding on either of the defendants Chevillard or Patron, and I do not think it should be allowed to stay in the record.

The Court: I think the objection to that testimony goes to its weight rather than to its admissibility, so I will deny the motion and note an exception.

Exception No. 21

For the record, I move to strike out the statement alleged to have been taken by the FBI from Mr. Chevillard on the early morning of January 24 of this year, and I move to strike out that statement on several grounds.

First, I move to strike it out on the ground that the manner in which the statement was procured was denial of due process of law and violation of the Fifth Amendment of the Constitution of the United States. Your Honor will recall that there is a series of decisions rendered in the last couple of years which deal with the taking of statements, admissions, and confessions from a defendant, and without enumerating them in detail your Honor knows that they condemn the use of anything that approaches [167] coercion, that amounts to duress in its procurement. You heard the testimony of the FBI agent, who testified as to the manner in which this statement was procured, that it is not

the language of Mr. Chevillard, that there were discussions as to what should go into it, that they had to talk to him as to the kind of words that would be used, and so forth and so on. I am not going to take any further time to recapitulate that testimony, but I move that that statement be stricken from the record, in so far as the defendant Chevillard is concerned, on the grounds I have stated, and on the further ground that it is a statement containing a mere narrative of past events and is not corroboration of any other portion of the record as to any of the matters or things set forth therein, and calling your Honor's attention to a case in 312 U. S., just recently, it being a statement of that character, it must be corroborated before it can be admitted.

The Court: I will deny the motion and you may have an exception.

Mr. Friedman: I think I have covered all of the material parts with the exception, and I probably can state it briefly, of the exhibits that were admitted and I assume they were admitted like all other things subject to our motion to strike, and if I do not make my motion to strike I waive my objection. I will make them very briefly without argument.

Exception No. 22

I move to strike out Government's Exhibit No. 4, which is a memorandum showing the percentage of cuts which I believe I have already mentioned that are involved in the conversation between Barral

and Hinman in the Palace Hotel, on all of the grounds I urged against its admission.

Exception No. 23

I move to strike out Government's Exhibit 5, which was a delivery tag, on the ground that it is not binding on the [168] defendants, and that they had no knowledge thereof, and never authorized or procured the signing of any such tag by the representative of the War Shipping Administration, or United Fruit Company, and that they never ratified or confirmed that fact.

Exception No. 24

I move to strike out Exhibit No. 6, which was a list of meats given to the Ed Heuck Company showing the items to go on the truck. Your Honor will recall that that was testified to, as I recall, by Mr. Hinman, that he prepared a list of the meat, not with any of these defendants, but an independent transaction of his own to give to Mr. Heuck. That does not prove what meat went on the truck, that only proves something he told Mr. Heuck to do, and I feel it has no place in this case, and it certainly falls into the rule of *res inter alia acta*, and it is not binding on either of the defendants, what Mr. Hinman did of his own volition.

Exception No. 25

I have already moved to strike out the tag signed by Rodriguez, which is Exhibit No. 9, and I again make the motion in the order of continuity.

Exception No. 26

Now, as to Exhibit No. 13, which was a note left by Kinelle on the night of the 23rd of January, I believe at the Normandie Restaurant, which was an order for so many pounds at 35—15,000 pounds, or whatever that was at 35—I move on behalf of the defendant Patron to strike that out on the ground that it is not an act, transaction, or event binding upon him. There is not one word of evidence in the case that Mr. Patron at any time was attempting to sell any meat to anybody, and therefore the transaction between Chevillard and Kinelle is not binding on the defendant Patron, he is not responsible for that, [169] and therefore could not be used against him.

Exception No. 27

I do not know whether your Honor admitted Exhibit 17 against all parties in this case, but if so I move to strike that Exhibit No. 17.

The Court: No, that was admitted only as to the defendant Rodriguez.

Mr. Friedman: I think that is all of the motions to strike.

The Court: Those motions will be severally denied and exceptions noted.

Exception No. 28

Thereupon Mr. Friedman, on behalf of the defendant George Patron and on behalf of the defendant Fernand Chevillard, moved the court to direct the jury to return the following verdicts, to wit: a verdict finding the defendant Patron not guilty on

count one of the indictment, a verdict finding the defendant not guilty on count 2 of the indictment, a verdict finding the defendant Patron not guilty on count three of the indictment, a verdict finding defendant Chevillard not guilty on count one of the indictment, a verdict finding the defendant Chevillard not guilty on count two of the indictment, a verdict finding the defendant Chevillard not guilty on count three of the indictment. Each of said motions was made upon the ground that the evidence introduced by the Government was and is insufficient to support either a verdict or a judgment of guilty as to each defendant, and that no offense sought to be charged in each count of the indictment had been proved by the Government as against the defendant Patron or as against the defendant Chevillard. The court denied each of said motions for directed verdicts to which ruling of the court each of said defendants duly excepted.

United States' Exhibits No. 5 and No. 9 are in the words and figures following, to-wit:

Ed Heuck Company
Butchers
Sausage Manufacturers
522-530 Clay Street
San Francisco 11, Calif.
Phone SUTter 1237, All Departments

Jan. 23, 1945

Sold to United Fruit Co

Address SS Sea Perch

Asst. Beef WSA A Army

4352	Ground Beef	82
8804	Boneless Rounds	177
2572	Strip Loin bone in	58
3347	Boneless Sirloin Butt	64
1153	F. T. Tenderloin	24
4046	Oven Prep. Ribs	87
10452	Boneless Prepared Chuck	196
2727	Boneless Plates	53
.....	D. S. Bellies	
.....	Beef Liver	
606	Head Cheese	5
501	Liver Sausage* Heucks	5
1247	Bologne Ty I	14
3031	Pork Shldr. A Army	29
2329	Semi Boneless Pork Loin	46
3506	Pork Link Sausage Ty II	35
.....	Spareribs	
1045	Fab. Veal AA Army	9
7034	Fab. Lamb AA Army	75

4002	Cr. Beef Brisket A Army	29
4045	Cr. Beef Plate A Army	30

No claims allowed unless reported immediately

Office Copy Army
 [In margin]: Brandt Nielsen

U. S. EXHIBIT NO. 9

Ed Heuck Company

Butchers

Sausage Manufacturers

522-530 Clay Street

San Francisco 11, Calif.

Phone SUtter 1237 All Departments

Sold to United Fruit Company Jan 23 1945

Address SS Sea Perch

Asst. Beef WSA Army

4352	Ground Beef	82
8804	Boneless Rounds	177
2572	Strip Loin bone in	58
3347	Boneless Sirloin Butt	64
1153	F. T. Tenderloin	24
4046	Oven Prep. Ribs	87
10452	Boneless Prepared Chuck	196
2727	Boneless Plates	53
.....	D. S. Bellies	
.....	Beef Liver	
606	Head Chese	5
501	Liver Sausage* Heucks	5
1247	Bologne Ty I	14

3131	Pork Shldr. A Army	29
2329	Semi Boneless Pork Loin	46
3506	Pork Link Sausage Ty II	35
.....	Spareribs	
1045	Fab. Veal AA Army	9
7034	Fab. Lamb AA Army	75
4002	Cr. Beef Brisket A Army	29
4045	Cr. Beef Plate A Army	30

No claims allowed unless reported immediately

Office Copy Army Berth 2 Outer Harbor

(Superimposed upon the foregoing by means of a rubber stamp, the names of Hamburg and Rodriguez being written thereon in long hand was the following:)

I certify that the services above specified have been performed or that the articles in quantity and quality above specified have been delivered to the vessel in good condition.

Checker H. Hamburg

Master

Chf. Officer

Chf. Engineer

Chf. Steward J. Rodriguez

Chf. Purser

Radio Opr. [172]

(Attorneys for the defendant Vincenzini and the defendant Jacky, having made motions for directed verdicts of not guilty, said motions were granted by the Court and the further

attendance of said defendants at the trial was excused and their bail exonerated. Thereafter the trial proceeded solely against the defendants Chevillard, Patron and Rodriguez.)

Testimony of George Halstead for the Defendant
Rodriguez

GEORGE HALSTEAD

produced as a witness on behalf of the defendant Rodriguez, having been previously sworn, testified in substance as follows:

Direct Examination

(By Mr. Resner)

The papers I hand you are those you requested during the noon recess. This is the recapitulation sheet for three voyages. It is an analysis of subsistence costs for each voyage of the Sea Perch. The Sea Perch, since she was commissioned, has made three voyages and is now on her fourth. That sheet shows the cost per mile and cost per pound of food consumed. As to voyage three it shows the cost for three meals per day per man to be 63½ cents; with respect to voyage two it shows costs per meal or day as 84 cents; as to voyage one it shows costs per meal day as 98.3 per day. These sheets do not show the meat stores on hand at the end of each voyage. They show only the consumption which would vary according to the amount of men fed on the ship. On voyage No. 1, the total

number of meals served was 54,030 $\frac{2}{3}$ days, which must be multiplied by three to get the exact number of meals. We serve three meals a day and in our bookkeeping we term it "meal days." For voyage 2 it shows total number of meal days as 112,939- $\frac{2}{3}$ days. For voyage 3, a voyage from San Francisco, on the tenth month, thirtieth day, 1944, [173] arriving back in San Francisco on the 28th day of the 12th month, 1944, the total number of meal days was 108,481. On other sheets there is a showing of the consumption of food according to poundage. On voyage one the amount of meat consumed per person per day—which included fresh, canned, sorted and smoked, was .845 pounds per day. Voyage No. 2 was .951 pounds per day. Voyage No. 3 was .638 pounds per day. There is also a breakdown of bread and cereals, groceries, fruits, vegetables, fish and dairy products. All these matters are on these sheets. The consumption of poultry on voyage three per man per day was .123 pounds. On voyage two it was .105 pounds and on voyage three it was .094 pounds.

The sheets testified from by the witness were marked in evidence defendant Rodriguez's Exhibit D. When I went on board the ship and checked the ship for the orderliness of the stores and the cleanliness, I did not check for anything else. I didn't check the inventories. It is part of my duties to check inventories at different times, not every voyage of a ship coming in. There are times we make a spot check of different ship at different times. If we think anything is wrong we will take

a spot inventory if we have time to do so and that is done on different ships. I had no occasion to take a spot inventory on this ship of Rodriguez. When I went on board the Sea Perch I inspected the whole ship for orderliness and cleanliness. I go aboard to see if there are any questions, any crew trouble and for various things in my capacity and I can't recall exactly. I did receive a letter from Rodriguez with respect to some meats that were going aboard the ship with regard to the quality of the food. The list you show me is the one I refer to and was received in my office before the ship arrived.

(Letter admitted in evidence as defendant Rodriguez Exhibit E.) [174]

I have known Mr. Rodriguez since about 1930 and he has been connected with the United Fruit Company since that date. I have been connected with the same company during that same period of time.

Cross Examination

By Mr. Friedman:

The Army cooks prepare the food on the ship. These cooks are supplied by the Army and not by the United Fruit Company. Referring to the three sheets that are now Defendant Rodriguez' Exhibit E the figure .638 per day refers to the pounds of meat served per man per meal. It is arrived at by considering every meal day of the voyage and every meal served in that voyage. It does not necessarily mean that at any meal in which meat was served

there was only .638 pounds of meat served to each person. That is the average for the entire voyage. This average is arrived at by including all meals whether or not meat was served at those meals or not. This does not tell exactly how much meat was served at each meal. It tells how much meat was served for a thousand meal days. That is true of all these other things. The poultry is arrived at by using the same basis of computation and includes meals in which poultry was served and meals in which poultry was not served. Mr. Rodriguez ordered the food for the ship. He does not actually place the order with any company. The United Fruit Company picks out the supplier of that food. We place it with a firm that has been authorized by the War Shipping Administration for us to do business with. Neither myself nor the chief steward have anything to do with the quality of the meat placed on the ship. That is the Government's worry.

Testimony of Julio Rodriguez on His Own Behalf

JULIO RODRIGUEZ,

one of the defendants, called as a witness in his own behalf, being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Resner:

I was born in Porto Rico, February 1, 1901. I am forty-four years old and a citizen of the United States. I have been a seaman about twenty-seven

years, twenty-four years steadily. My last rating on board ship was chief steward and I have been such since 1941. Prior to that I sailed as second steward and I have sailed in the Steward's Department. My wife is dead. I have two children. One was killed last September in France. My daughter is married and lives in South America. I have been on the Sea Perch since she was commissioned. I have been with the United Fruit Company since 1929. I first met Pierre Barral in New York in January, 1944. Barral was standing by to go on the Sea Perch as supervising chef and was introduced to me by the port steward in New York City. Barral made the first voyage with the Sea Perch. I did not employ him nor assign him to the ship nor ask that he be assigned to the ship. He was with the vessel on the second voyage as supervising chef and on the third voyage he was second steward and storekeeper. I do not speak French. I speak Spanish, Italian and English. On these voyages Barral always bragged how much money he made on a tanker when he was chief steward. He told me how much money he made selling meat and grocery stores, all those things. Some time in December, before the vessel came back to San Francisco, on the 25th I instructed Barral to take inventories. The ship was at sea. It takes a little time for taking inventory and figuring out and typing it, and to make the requisitions. Barral gave me the inventory on December 26 about noon. It was made up on the [176] company form, the same as Government's Exhibit 2. After I received the in-

ventory prepared by Barral I did not report that inventory to the company. I posted from that inventory on my paper. From Barral's figures I figured out consumption and what we would have on hand on my ships. My average was 23.5 per meal, and it was based upon the figures Barral had brought me. I was in doubt of that average. It was Barral's job as storekeeper to keep track of the supplies of the ship. After he gave me the inventory I was not satisfied. I went down below to see the ice boxes and when I opened them I knew I had more meat in the ice boxes than on the inventory he gave me. I took another inventory. It was different from Barral's inventory in that I found about \$15,000 more. There was more money on my inventory than his inventory. My inventory showed more supplies than his. It showed more supplies of meat than his inventory did. On this inventory it showed \$15,000 of meat representing about eight or nine thousand pounds. Neither at that time nor at any time on the ship did I tell Barral that, "We had ten or twenty thousand pounds of meat over that and nobody knew about it, and there was a chance for us to make some money." I never told him anything of that character.

I prepared the inventory which is Government's Exhibit 2. I typed up the figures on that sheet of paper from my pencil copy which is on board the ship. I believe I gave the pencil copy to Agent Johnson of the FBI. I gave Barral's inventory back to him. I did not tell him his inventory was

wrong nor report it to the company. I just gave my inventory about the stores I had to the company. I prepared six papers, one remained on the ship. The other five I gave to the port steward. That shows the amount of supplies with regard to meat that was on hand at the time I came into port, my inventory truthfully represents the meat that was on hand when the ship came back. I did not conceal nor divert nor [177] cover up anything. I did not have any meat on the ship which isn't reported on this inventory. Everything is there.

The ship arrived in San Francisco on December 28. I left the ship December 30. I gave the inventory to Mr. Halstead on our day of arrival. He came aboard the ship. I made the rounds of the storeroom with him. I returned to San Francisco on January 13. Before I left San Francisco I did not have any discussions with Barral about anything having to do with diverting meat from the ship or selling it or anything of that character. Barral didn't report on the ship on the 29th and 30th. From the time the ship docked until I left for New York I had no talk with Barral except to tell him to take care of my department while I am away. When I came back I did not have any discussions with Barral about anything having to do with diverting meat or stealing meat or anything of that character. On January 16 I went to lunch about 2:30. Barral took me to a place to eat some fish. I don't know San Francisco and I don't know the place or the street. I do not know if he took me to the Heuck Company. He took me to a butcher

shop or meat company. Barral went up to see this man and he said, "I have 10,000 to 15,000 pounds of meat I want to sell." This man said to him, "Well, I don't know how I can buy this meat. Barral told him he could sell the meat some place and the man said he didn't know about that, that he supplied the ships. Barral said he knew that he was going to supply his ship and said, "Can you make it so many thousand pounds you deduct from the meat you send, to send 15,000 pounds?" The man said he didn't know how he was going to get away with that and said he would let him know. I started to go. I did not participate in this conversation which lasted about five or six minutes. That morning I had not phoned to anybody to make an appointment to see anybody in the Heuck Company. I did not talk to Hinman. When we got on the street I was very indignant and [178] I said to Barral, "What is the meaning of taking me to a place like this and talking of crookedness?" Barral said, "Well, I want to surprise you to make some money so you can have some money." I told Barral that I didn't need any money, that I make enough money, and I said, "Next time you mention a thing like that I will report it to the police," and I left and reported to the ship. Nothing else was said at that time. After that I never saw or talked to anybody from the meat company or anybody else. I never had any dealings with this meat company before in connection with ordering any meat for the ship. I never saw that man again until I see the man testify against me and I don't know if it is the same man or not. When I was

in jail, two men were there. Three or four days after I was arrested Mr. McGee said that Barral had said that I went to see the meat company to make a deal with them. I told Mr. McGee, "I haven't done any such thing." Mr. McGee showed me a picture and said, "Is this your picture?" The picture you show me is the one Mr. McGee had. I told McGee the picture was taken five days before this happened in San Francisco. Mr. McGee took that picture from me. About an hour later two men came over and Mr. McGee called me out. McGee asked one of the men if he knows me and he said, "I believe yes, but he had a coat on." The other man didn't know me at all. I told McGee I never saw this man before, I never saw his face at all. He said nothing else at that time.

In the period from January 15 to 24, I went to the Normandy Restaurant very often, almost every night. I ate there. I was a regular customer there. I had been there on earlier voyages. I had dinner at the Normandy the night before I went to New York. I know Mr. Chevillard and Mr. Patron. I was introduced to him by Barral about six months ago. I never had any talk with Chevillard or Patron about getting meat off the ship. [179] They never approached me on the question of getting meat off my ship. I never told them I could pick up meat for them. The nature of my relationship with them was just a patron in their restaurant.

Mr. Brandt-Neilsen came aboard the ship on January 23, about 7:30 in the morning. He came to my room. All the checkers generally come to my

room and leave their clothes there. Brandt-Neilsen and I talked about the ship, about chief stewards on ships nowadays and that they don't know much about the ship, that they waste enormous supplies about the ship and I told him if every ship steward aboard the ships would take care of the ship there would not be any scarcity of supplies in the United States. Of course, every transport ship they waste about 50 per cent of the food by throwing it aside by not knowing how to prepare it or not knowing how to take care of the food. Then I said to him, "Did you get anything from the meat company?" I was joking with him, and he said, "What do you mean?" I said there are many tips going around here and I said the quality of the meat they send aboard the ships now is so bad, I said, as a matter of fact I had 10,000 pounds of corned beef which was impossible to eat and I transferred about 5,000 pounds of it in New Guinea to another ship. I asked him if he passed on the quality of the food and he said he had nothing to do with inspecting the supplies. I mentioned to him that in past times we used to inspect all of the food ourselves, and he said "Yes, but nowadays we don't do that, we don't inspect it."

With regard to the amount of food that is served a hundred men, I had regulations to follow in that regard, which are issued by the United Fruit Company. According to those regulations there is supposed to be issued to the troops per hundred men from forty-five pounds of meat to a hundred pounds

of meat per hundred men, all depending on the kind of meat you serve. [180]

I did not give Government's Exhibit No. 5, the bill from the Heuck Company to the United Fruit Company, to Brandt-Neilsen to sign. I did not tell Barral to give it to him to sign. That is my signature in the upper right hand corner of Government's Exhibit 9. It is dated January 23. I remember signing that. It is a matter of routine every trip. When they receive all the supplies aboard the ship the head checker comes into my room and places it on my desk to be signed. Mr. Hamburg brought this aboard, together with other papers. There were about 250 bills, separate pieces of paper there, and I signed my name to all of them. Each bill has five copies and I had to sign all of them. I didn't read them before I signed them. You can't read them because you don't know whether it was received or not. When the food is delivered to the ship by truck I did not check it on to the ship. I have nothing to do with checking it on to the ship. When I signed this receipt for delivery of meat, Government's Exhibit 9, I did not know if the meat was aboard the ship or not and that is true with respect to all of the other supplies. Mr. Hamburg is the head checker. When he brings these papers down to me to sign he requires me to sign it. That is just a matter of routine. You never know until you come back from the trip if there is anything missing. During the trip you will find out.

I never gave Barral any instructions nor told him that he should have any dealings with Heuck

or Hinman of the meat company or that he should divert the meat or that he should go to anybody about it. I did not know anything about what was going on.

On January 22 Barral came on the ship about 10:30 to eleven o'clock. He was supposed to be on the ship at eight o'clock in the morning. I told him on Sunday morning to be on board the ship as the ship was to be stored at ten o'clock [181] in the morning and he came in about eleven. The 22nd of January was not Barral's day off. On January 23 Barral got on the ship about 11:30 or twelve. He was due at six o'clock in the morning. The day before I told him to be on the ship at six o'clock because that is the first day we are going to feed the ship's crew and officers. I was on the ship at six, Barral was not there. He showed up from 11:30 to 12. I left the ship at 7:30 in the evening and they were still loading. While the ship was at the Army Base, at Oakland, I lived on the ship. I had no room ashore. Between January 15 and January 23, Barral had two rooms ashore. He told me he had a room at the Hotel de France and he had another room in a hotel somewhere else. Barral was entitled to be off the ship from January 13 from noon until January 22, eight o'clock in the morning. He was gone during all of that period. After January 20 he was not entitled to be off the ship. From January 13 to the 20th I only saw Barral once around the ship. During that period I believe I saw him one night in the Normandie.

On the night of January 23 I was in the Nor-

mandie Restaurant and left there about eleven o'clock.

I never saw the plant down in Millbrae. I was never there. I do not know Mr. Jacky. I do not know Mr. Vincenzini. The first time I saw them was in jail.

On January 23, Barral did not tell me that there was a meat truck on Sansome Street. He did not tell me that he had to go to San Francisco and get the truck or to make arrangements to have the truck driven to Millbrae. I did not tell Barral to go to San Francisco, to take the delivery tag over to the Heuck Company. I did not excuse him from the vessel to go any place to do anything in connection with any meat or anything else. I did not have any conversation at all with Barral along the line [182] of going to San Francisco to get a meat truck or take a delivery ticket or anything of that character. All of the afternoon of the 23rd I was about the ship.

(Thereupon an adjournment was taken until March 14, 1945, at ten a. m., whereupon the following proceedings were had:)

Direct Examination of Julio Rodriguez Resumed

With respect to the uniform I wear and the rating I have, I am a lieutenant in the Maritime Service.

Cross Examination

By Mr. Hammack:

I am a lieutenant, senior grade, in the United States Maritime Service. That picture reflects me

wearing the uniform of a lieutenant commander in the United States Maritime Service. My testimony is correct that Barral's inventory was about \$15,000 less than my inventory and this \$15,000 represented about eight or nine thousand pounds in meat. Meat is about 35 or 40 cents a pound. I didn't say the \$15,000 was in meat alone. I found more groceries, dairy products, and fish than was all included in the inventory. There was eight or nine thousand pounds of meat, but the \$15,000 included all the supplies on the ship. If I testified differently yesterday it must be a mistake. I went to a butcher shop with Barral. It looked like a butcher shop and something like that. It was about 2:30 in the afternoon. I do not know whether on the voyage before I had received meat from the Heuck Meat Company. I don't keep the record of the delivery tags and invoices for supplies, including meat. I just have bills from different meat companies for supplying the ship which we post in our inventory. I don't go through the bills and see who supplies the ship, it isn't my business to know that. [183] I post the bills on the books. On the bills is specified the amount of pounds and the costs. I am just interested in my forms to post those bills and poundage on my form so I will know the amount of meat I have. I will explain how I know where a particular shortage occurred. If we had received 10,000 pounds of corned beef or 10,000 pounds of expensive roast and I have on the bill of fare expensive roast twice and on the third time I put on the bill of fare, by that time, pot roast, the

storekeeper tells me there is no more beef left and then I go through the bill of fares and see how many times I serve the particular item, then I know how many pounds I consumed. If there is no more left, I know there is so many pounds missing and I make a notation on my check. At the end of the trip on my voyage letter I explain to the port steward such item was not aboard the ship. The port steward knows which company the meat is supplied from because meat is supplied from different companies. I have these bills, a copy of this delivery tag, on board ship. While I copy or make a record of all the items on her pertaining to beef I never did see the name of Ed Heuck Company Butchers. When I went to the butcher shop with Barral that place was a shanty, and when he took me in he says, "We are going to see a friend." He seemed to know where he was going. I didn't look at the windows and the fact that it was the Ed Heuck Meat Company and had the name on the doors and windows meant absolutely nothing to me at all. When I went to the butcher shop with Barral he told me we were to see a friend of his. He did not say why. When we arrived at the meat company, Barral told the man he had a proposition to make. It was in an inside room that looked like an office. Barral said to this man that he had from ten to fifteen thousand pounds of meat he wanted to sell and this man said to him that he didn't know if he could buy the [184] meat or not. He said he supplied ships and Barral said, "Well, if you supply ships and you say you can make a transaction, in-

stead of sending on board ship the full amount you can send aboard the ship ten or fifteen thousand pounds less." When he said that I just left there. I knew something was going bad. When I got outside Barral was after me. I told him to get away from me and the next time he mentioned to me that I will report it to the police. When I got outside I didn't fire Barral, I told him to get away from me. When we were in the place talking to the man in the meat company I didn't say nothing, not a thing.

On January 16 I found Barral when I came out from Pier 39 on the Waterfront in San Francisco. Barral was waiting for me. I told him I wanted to have some lunch. He took me some place nearby to a fish place. Following this conversation at the meat company I did not report that conversation to Mr. Halstead. I know that Mr. Brandt-Neilsen was a checker of supplies on the ship. I don't know that Mr. Brandt-Neilsen merely checks the items and that he doesn't check for the quality of anything that comes aboard that ship. I don't have anything to do with checking the supplies on board the ship. I did not know an Army man was down there, checking meat for the quality. I see Army men on the deck but I don't know what they are doing. I do not recall if the soldier who testified here was on the dock or not. Brandt-Neilsen never told me he was a meat inspector. I believe he is a checker. I did not think he was a chief steward on January 23. I never saw him inspect the quality of the food because I have never been with him to

see if he inspected the quality of the food. When I told Brandt-Neilsen that he should be making a lot of money I was only joking with him and teasing him by saying that checking food properly nowadays, by not checking properly. He said, [185] "What do you mean?" and I said, "The quality on board the ship is bad these days." And I referred him to 10,000 pounds of corned beef we had on board, which was very inferior quality. I was only teasing the old man. I know he put my orders for meat through the United Fruit Company and who supplies the ship I do not know. The only time I examined the meat contained in boxes on board ship is when the storekeeper can't do it or asks me. On the Sea Perch trip in September the meat received all came in the same type of box, as Government's Exhibits 7A, B and C. I never noticed on the prior trips the marks, "U.S.A." or "United States Army" stamped on there. I have been a chief steward since 1941. I know Mr. Hamburg. He is the head checker. Mr. Hamburg doesn't check for everything and the only time I see him is when he comes in to have the bills signed up. When he comes in to have the bills signed, I did not say to him, "Well, you must be making a lot of money too." I don't tease this fellow because I am not acquainted with him much.

(Defendant Rodriguez rests.)

Testimony of George Patron, One of the Defendants.

GEORGE PATRON,

one of the defendants testifying in his own behalf, being first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Friedman:

I reside at 1326 Powell Street, San Francisco. I am forty-two years old. I am a part owner of the business known as the Normandie Restaurant, located at the address I just gave. Fernand Chevillard is my partner in that business. I am married and have a boy nine years old. I have been identified [186] with the Normandie Restaurant about sixteen months. The character of the premises at the Normandie Restaurant is we have a restaurant and a bar and a kind of family trade coming there. A family trade mostly. There is a little dance floor there. After eight o'clock there is a little dance floor. With reference to the family trade, that is people do not just come and eat their dinner and leave. They come to eat and stay for a little fun after their meals. I know Pierre Barral. I just met him in San Francisco about twenty-two months ago. I met him when I took a trip at sea on the Monterey, on which I was leading cook. Mr. Barral was the chef. I made three trips and the last trip was three months and was the trip on which I met Barral. On the trip we did not necessarily become close friends. Being a Frenchman I talked

to him more than I would have to somebody else. A month or two months after my last trip on the Monterey I became identified with the Normandie Restaurant. After that I lost sight of Barral for about fourteen months. I left him in New York where I quit the Monterey and came back to San Francisco. About five or six months ago I popped up in San Francisco again where I saw him in the Normandie Restaurant. The conversation I had with him at that time I just said, "Hello" and something. He told me he expected to have some meat from a meat company and if I was interested. I kind of laughed at it and said, "Well, you better see my partner because I don't care of the food handling." He then went to my partner but I don't know what they talked about. Barral first mentioned meat to me four or five months ago, the first time he came in. After that first conversation Barral came in and out of the Normandie. One time he told me, "What is the matter with your partner that he doesn't buy that meat?" I say, "What am I going to do; maybe he don't need the [187] meat." He was kind of sore about it, but I say I can't do anything about it if he doesn't want it. Those are the only two conversations I had with Barral about meat up to this year. I saw Mr. Rodriguez in the Normandie quite often before I was arrested. He came in the bar and had supper and stuff like that. Mr. Rodriguez never discussed with me any conversation about his having any meat or me or my partner buying any meat or the fact that he had any meat to sell. Barral never discussed with me

the question of his having any meat or the fact that he was going to get any meat in the presence of Mr. Rodriguez. I saw Barral in the Normandie after Christmas when he came back from sea. It was two or three weeks from January 23. He said, "I got some meat and I make arrangements with the manager of the meat company. I hope to get that meat and I hope you fellows can buy it." I told him I didn't know and to see my partner again. I told him I don't take care of the food handling. My duties in the Normandie were to take care of the bar and my partner took care of the food and dining room. When Barral mentioned to me this fact that he expected to have or was going to have some meat and asked me whether or not we were interested, I again referred him to my partner. The next conversation with Barral about meat was a few days before the 23rd. He got mad and said, "What is the matter?" and I referred him to my partner. I said, "After all, it looks pretty fishy, that meat of yours, and I don't blame my partner if he doesn't want to go along with you." That was maybe two or three days before the 23rd. The next time I talked to Barral about meat was on the 23rd at the Normandie Restaurant, about a quarter to four or four in the afternoon. He was alone, and just he and I had the conversation. He said he had a truckload of meat and he has to move it and I said, "What do you mean, a truckload of meat? Where [188] did you get it?" He said, "I fix it up with a manager of a meat company." My partner was away then and I said to Barral, "Why don't

you wait for my partner and do whatever you want to?" Barral said he intended to get a cold storage to store it in and I said, "I got no time to go on stuff like that, to wait until my partner comes." He says, "I got to get a driver." I say, "I don't have no driver here. I don't drive trucks." So Barral went away. I thought he was gone for good. Ten or fifteen minutes later he came back with a truck driver, his first name was Lucien. Since this trial started I have learned that his last name was De Angury. This man was pretty drunk. Barral said, "Let's go. You have got to show me that place there, to that frigid air place, wherever it is." I told Barral that I wasn't able to go there because I don't know the place over there by name or otherwise. I told him I don't know where the place was. Barral then took a map from his pocket and says, "That is the place." It was a little map, Millbrae, and I know where Millbrae is. I said that I didn't want to go but still I feel like a heel. He says, "You are a fine fellow. Just take me over there. You can find the place." He didn't know the place himself and neither did I but he had the map. Then I took them to Clay and Sansome, I think, where I saw a truck there, a yellow truck. They got out of my car and went in the truck. I was parked in the next block. I told them to go to Millbrae, to go by Third Street, taking the Bay-shore and after a while they will see Millbrae on the right and to turn right. Lucien was so drunk I was afraid something might happen but Lucien knew the countryside better than Barral. Then I went

myself on Third Street and had a glass of beer. They were going slow and I had a lot of time. Then I went on Third Street and I came back to see if they were coming up there. On Third Street they were stuck with their [189] battery. Naturally I come to the truck and say, "What is the matter?" They say there is some trouble with the battery, which is true I think, so I took Barral to a gas station about three or four blocks away. I saw the man in the gas station and brought him back to the truck with the battery. And I take him back to the station with the dead battery and when I see it is going to be all right I left. From the gas station I went to see if I could find that frigidaire. It was already six o'clock or more than that. I have never been to this so-called frigidaire place. I did not know Mr. Jacky. I do not know Mr. Vincenzini. After the battery was fixed I went to Millbrae and turned to the right and go to the old highway and I went to the gas station and asked where was the Millbrae Dairy. The man told me it was a quarter of a mile on the left side of the road. I finally got to the Millbrae Dairy where I saw Mr. Jacky. I didn't know him, but I met him there and said: "I am from the Normandie Restaurant," and gave him my card. That card was of the Normandie Restaurant and I don't know if it had my name on it or that of my partner. I had never seen Mr. Jacky before and when I did meet him I promptly introduced myself and gave him my card. Mr. Jacky recognized me and said, "I think there is a man you know that is on the phone." Mr. Chevill-

lard was there phoning someone there inside. When Mr. Chevillard came out at about the same time and then they asked me about the meat, if the meat was going to be there and I said, "They have trouble with their battery, but they are going to be here pretty soon now." Mr. Jacky was very much in a hurry. He wanted to go to some dinner somewhere. We waited a little and Chevillard and I went back to see if the truck was coming up. We took one car and went to the highway to see if the truck was coming. I could see the truck because it was a yellow truck. I could see it half way between South [190] San Francisco and Millbrae Dairy. We saw the truck on the road, I mean like parking, so we went to the truck and say, "What is the matter?" They say we have trouble with the lights, that the police says that we have no lights and we have to get lights fixed before we can keep on going. The truck was right near a station, where they came to get the lights fixed. We waited a while and I went to get a cup of coffee or something like that and then my partner went back to tell Mr. Jacky that the thing was coming. I stayed at the Millbrae Dairy five or six minutes and I went back again to see if that truck was coming from the junction. I was afraid that they might miss the Millbrae Junction and I wanted them to see me to lead them to the Millbrae Dairy which was two or three miles from there. I went back to the junction of the highway and the old road. Mr. Chevillard stayed at the plant with Mr. Jacky. The truck came along and came to the plant. They began to open up

that truck and Mr. Jacky said, "I never expected so much merchandise. I don't know if I have a place to store so much of that." I didn't see his frigidaire. He began to unload and after about ten or fifteen minutes there was some wooden boxes and my partner said to Barral, "I didn't know this was to be Government meat." Barral said, "That is all right. If you don't want to unload the truck, just mark down the number." Then we kept on unloading. We had no other choice, but to keep on going. The truck was unloaded after which I left Jacky's place and went to the Normandie, where I arrived a little before eleven o'clock that night. I don't know whether Mr. Chevillard was at the Normandie before or after I got back, but it was pretty close to the same time. In all the conversations that I have told about or any others that I had with Mr. Barral, from the time he came back from his trip at the end of December until I got back to the Normandie Restaurant [191] on the night of January 23, Mr. Barral never told me there was 15 or 20,000 pounds of meat on the ship that he wanted to sell. He never told me that he had any meat on the ship that he wanted to sell. He never told me that this truckload of meat he expected to get was to be meat that was to go to the ship. Barral never told me that the meat company was going to send a truckload of meat out and bill it to the ship. Barral never told me that anyone connected with the ship or with the Government was to sign any papers for this truckload of meat. Barral never told me that the meat company was

going to bill the ship or the Government for this truckload of meat. The first time I realized that the meat in the truck belonged to the Government was when Chevillard popped out. That was when Chevillard said, "You fooled me. You didn't tell me it was Government meat and it is Government meat." That is the first time I realized it is Government meat. On the 23rd, before I drove Barral and Lucien to the truck, I first took them to Lucien's house. Lucien wanted to change his clothes. When Barral came back with Lucien, I drove them to Lucien's house and then to where the truck was. Mr. Chevillard was not there. When I drove away I left word with my wife that if Mr. Chevillard came that she should tell him I was going to Millbrae.

Cross-Examination

By Mr. Hammack:

I did not tell my wife where I was going in Millbrae. Mr. Chevillard was at the Millbrae Dairy when I got there. I take care of the bar in the Normandie Restaurant. Most of the business is done from five o'clock in the evening, until twelve o'clock at night. We had very little business in the day time. On January 23, Barral came in about 3:45. He went after [192] a truck driver. I left the Normandie around four or four twenty, maybe later. I drove these two men first to the truck driver's house to change his clothes. Then I drove down to the truck. I saw the truck on the highway on its trip down to Millbrae. I knew that Mr. Barral had a map to

get to Millbrae. I supposed De Angury knew the way down there, but he was drunk and I figured it was pretty hard to find that place with a big truck like that, but with a small car I could find the place. They, in the truck, could find it, if a fellow wants to scout around. They told me to go ahead and show them the way and I went down to show them. I helped them fix the battery and brought the battery back to the truck. I saw the size of the truck. I told Barral it was quite a lot of meat. I did not ask him and there was no discussion about where he had obtained that meat. He just told me he had a truckload of meat from the manager. I did not know it was Government meat until we were unloading it off the truck. I did not stop unloading the truck right then. I continued unloading the truck. I returned from Millbrae in my car. I think it was the same route I came out but I don't know if I come out on Third Street. I went to South San Francisco. I did not stop there. I did not report to the Police that Barral had a truck load of Government meat down there at Millbrae. I know they have a Police Department in San Francisco. I did not ring up the Police Department and tell them I had become involved in a matter in which a man had a whole truckload of meat down at Millbrae Dairy. I did not ring up the FBI and tell them anything about it. I did nothing until I was arrested. I was back at the restaurant an hour and a half before I was arrested. [193]

Testimony of Fernand Chevillard, one of the defendants:

FERNAND CHEVILLARD,

produced as a witness in his own behalf, having been first duly sworn, testified in substance as follows:

Direct Examination

By Mr. Friedman:

My place of business is at 1326 Powell Street. My home is at 520 Cherry Avenue, San Bruno. I am forty-four years old, married and have one child, a girl of fifteen. I am in the restaurant business, the Normandie Restaurant. Mr. Patron is my partner. We have been partners in the Normandie Restaurant since November 1, 1943. We have a bar, a restaurant and after eight o'clock it is classified as a night club. We have dancing and musicians and light music, an old French orchestra, accordion and drum. I am a citizen of the United States and so is Mr. Patron. The bar is inside of the place and back from the door. There are tables between the bar and the door. The bar is separated from the dance floor by a partition about four feet high. You can stand on one part of the partition and look over and talk across it to whoever is at the bar or the other way around. I take care of the dining room, the buying and the help and some bookkeeping. We have two ice boxes or refrigerators at the Normandie. One is used for milk, salad and cheese. The other for chickens, fish, meat and

whatever orders we have left. Those are the only storage places we have in the place. As far as those two cold storage boxes are concerned they would hold about four hundred pounds of meat, if you do not put anything else in them. We have no other place on the premises where we could store any food products at all.

I know Mr. Rodriguez by sight. I saw him many times in the restaurant. He came in as a customer. I never saw him [194] anywhere else besides at the Normandie. At all the times I saw Rodriguez he never talked to me about having any meat on the ship that could be sold. He never talked to me about my buying or his selling meat at all. He never talked to me about meat at all. Barral was first presented to me by my partner about five or six months ago at the Normandie. I know from what has been said here that sometime in September Barral went away on a ship on a trip and he came back about the end of December. Before Barral went away on that trip and sometime in September Barral spoke to me about my buying meat from him. That was not the first time I met him. Some of Barral's friends were there. Barral says, "Do you want to buy some meat?" I said, "I couldn't be bothered," the first time and went on about my business. He spoke to me about meat several times. The next day at the Normandie he says, "Did you make up your mind," and I said, "No, don't bother me." That is all that was said. I suppose the next day I said to him, "Where do you get the meat?" and he says, "I am fixing some-

thing with the manager of the meat company." This was all and he went away. I said, "Nothing doing." I think it was after New Years that Barral again spoke to me about meat. He says, "Are you going to do something this time?" I didn't answer. He talked to me about meat many times again—most every other day I should say. He told me the same story. He said, "I have got a deal with the manager of the meat company." He asked me again, "Are you going to do something about it?" I just walked off. That happened maybe five or six times. It was always in the course of the evening. I never stopped once to speak to him. He was following me around all the time. I mean he would talk to me about this while I was walking around my place tending to my business and he would come around and stop me. About a week before I was [195] arrested on January 24, Barral repeated to me the same thing. He said, "I think I am going to have some meat." I says, "How much?" He said, "I don't know, maybe 10,000 or 15,000 pounds." I said, "Where did you get that meat?" And he said the manager of some meat company. I asked him what company and he said somewheres downtown. He asked me if I wanted to buy some of it and I said, "No, don't bother me with that meat, you know a lot of people around here. You speak to the chefs who come around." Once he came and said, "Listen, I sell it to you cheap, you want it?" I said, "What am I going to do with 15,000 pounds of meat. I have got no money." He said he would sell it cheap 35 or 40 cents a pound, and I said, "If

you give it to me for two bits, I couldn't buy it." He told me I didn't want to help him and I said that I was sorry. I never told Barral up to January 23 that he had asked anybody to buy some meat. On January 22, in the Normandie, about eleven o'clock at night Barral spoke to me across the partition of the bar. He asked me what I was going to do and I told him to leave me alone. I said, "I don't want to have nothing to do with that. I have not got the money. I am too busy." Up to this time there had been no talk as to whether the meat should be kept any place. I then went about my business. About closing time he came to me and said, "Tell me where I can store it. A store place." So I studied a while and said, "All right, I will give you a place, I heard about a place in Millbrae." He told me he didn't know that town and asked how he was going to go there. I said I will give you the name and I will draw you something. I drew some lines and put the name "Millbrae Dairy" there. Several times before that Barral asked me if I knew any place he could store the meat and I told him, "You can't find a storage place to store that much meat." Before January 22 I did not tell him that I knew of any place [196] he could store the meat. I found out about the place I told Barral of on the 22nd because at that time it was very hard to find chickens, and as I was going home I saw a poultry place, Vincenzini Bros. So I stopped there. It was sometime around four on the 21st or 22nd. I saw Angelo Vincenzini there. I went to ask him for chickens. I did not go to Vincenzini

for the purpose of finding a place for Barral to store the meat. I went there for chickens. I had a talk with Mr. Vincenzini. I asked him if he had chickens and he told me that I didn't do much business with him now. I said that I bought all my stuff in San Francisco, that I don't have to go so far away. He said I was a good fellow and he would let me have some. He said at that time, "They are in my freezer," and I say, "Have you got a freezer over there?" and he said, "I have a freezer." So I said, "Some guy wants to store some meat. You think you can store it over there?" He asked me what kind of meat it was and I said, "I don't know. He gets it from a meat company, from the manager." He said, "There is nothing wrong with it, is there?" And I said, "As far as I know the meat, he told me there was nothing wrong with it." Then he says to me, "Do you think we could buy some from him?" and I says, "Well, I don't know," and he said, "It has to be good stuff. I do not want to go to jail." I said, "I think I don't want to bother with the stuff myself." Then Angelo Vincenzini called Millbrae. Up to that time I did not know Mr. Jacky and had never been to the Millbrae Dairy where the refrigerator or the freezing plant was. I heard the conversation of Vincenzini. He said that there was a friend of his with some chickens, and could come and pick them up. I couldn't hear the answer. Then Vincenzini said that somebody wants to store some meat, "Do you think you could accommodate about 10,000 or 15,000 pounds?" Then Vincenzini told me, he said,

[197] "Well, he might have room to store about half of that." That was all that was said and I left.

After I gave Barral this map of Millbrae, the next time I saw him was in Millbrae. I did not see Barral on the 23rd at any time before I saw him at Millbrae. Up to the time I gave Barral the map I had never asked him to get any meat for me. I had never asked him to get me meat off the ship. Barral never told me he had some meat from the ship that he wanted to sell. Barral never told me that he had saved on the ship 10,000 to 15,000 or 20,000 pounds of meat that nobody knew about and that he had it for sale. Barral never told me with respect to this meat that he was going to get, that it was meat that was to go to the ship or the Government or the War Shipping Administration. Barral never told me that the way they were going to get this meat was that the truck was going to be included in a shipment which was to go to the ship or the War Shipping Administration or was to be left out. Barral never told me that somebody at the ship would sign for it. Barral never told me that the meat company was going to charge this truck load of meat to the ship or to the Government or would present a claim to the ship or to the Government for this meat. Whenever Barral mentioned meat I said, "Is that right meat?" I never mentioned Government or anything. I said, "Is it regular meat?" and he said, "Yes," and I said, "You get it right from a wholesale house?" and he said, "Yes." Several times I asked him.

On the 23rd I did go to Millbrae. On the day

before the 23rd Mrs. Hughes, the hostess at the Normandie asked me to come and pick her up around 4:30 as she had to get tickets for Salt Lake City. Mr. Patron was not present. Barral never talked to me about meat when Patron was present. Mrs. Hughes lives at 35 Lake Street. She asked me to come and pick her [198] up. That is why I was at 35 Lake Street on the 23rd. I was there about ten or fifteen minutes and the telephone rang. Mrs. Hughes answered and said to me that Claudia, my partner's wife, is calling and wants to speak to me. I said that I didn't want to speak to her, that I didn't want to go back to the business right away. Mrs. Hughes said over the phone that she would try to locate me. I waited about ten minutes and then I called up Mrs. Patron and asked her what is it, and she said George had left word to tell me to come to Millbrae. I waited a while and then I went to Millbrae where I arrived about 5:30 or a quarter to six. I have been to Millbrae lots of times, because that is near my home. I had never been to this cold storage place, the Millbrae Dairy. I stopped in a lunch room and I had a cup of coffee and I asked if they knew where the Millbrae Dairy was and he told me it was down the road. When I came to the Dairy I went to the office and there was nobody there. I rapped on the door and a girl came to the door and I said, "Have you got a frigidaire?" and she said, "Jacky" and then I remembered that was the name Angelo had said to me before. I followed the directions of the girl and the place was closed up. I rang the bell and a man

came and said, "How do you do," and I said, "Hello, did Angelo call you yesterday about a storage place?" He said, "Yes." He said he was talking to him about 10,000 or 15,000 pounds and he has not got the room and he said, "Have you got any meat coming now," and I said, "I don't know myself. All I know is that I got word from my partner to come to Millbrae." We waited about twenty minutes and he showed me the refrigerator and then said that we should go into his apartment, which is behind the frigidaire, and we sat down there and he was telling me that he couldn't wait long because he had a birthday party at Lido's. I told him I didn't want to delay him any more and that if by [199] seven o'clock there was nobody here he should close his door and I was going back. He looked at his watch and said that he had seven minutes more and I said I would telephone back to the Normandie and see what happened there. Then Patron came to the place while I was telephoning. We waited a while and Patron said that we would have to go back to see if the truck was coming. We drove back down the highway and we saw the truck. It was about three or four blocks on the other side of the cross-section of South San Francisco. I saw a Police car there. They said the lights were bad and they had to fix the lights. I told Patron that we should have a cup of coffee and a glass of beer and then we drove back to Millbrae. He stopped there and Patron went away. The truck came while I was talking with Mr. Jacky, and then the truck was started to be unloaded. I was double checking

Mr. Jacky. I took my book you know and tried to write the numbers Jacky was calling out. Jacky was calling out the numbers and I would write it down. That went on for ten or fifteen minutes. Then I came back to the truck and at that time they were lowering the big boxes like this here. Those big wooden boxes. Then they unloaded cardboard carton boxes. I got mad and spoke to Barral in French. I told him what kind of a guy he was, he dragged me into a thing like that, that this was Government meat not meat coming from a butcher, I could see that. I recognized this as Government meat. I said to Barral, "You are crooked to drag us into such a thing like that. All you think about is money. You misled me in every way possible." Barral said something about cold feet. I was talking in French. He said, "If you won't do it, that is all right." I checked a very few boxes after that. Then I went to Jacky and asked him if he would take it and he said he didn't know. Jacky fixed up a bill or statement of the meat that he had got. [200]

I know Mr. Kinelle. He is a chef at the Troc, in San Francisco. About three or four days before the 23rd I spoke to him at the Normandie Restaurant. He was eating there. I was going around the floor and asking the customers how everything was and when I got to his table he says, "Is that the type of steak you serve here?" I told him that was all I could get, that I didn't have many points. He said I gave him the tail end of a filet and I said that I can't help it. I said that there was a guy

who had been trying to sell some meat. When I came back to the Normandie on the night of the 23rd I found this slip of paper that Mr. Kinelle said he left there.

The paper you show me, U. S. Exhibit 15B, headed "Chip Steak Company" on which it says, "Mr. Pierre Barral, 413 Jones Street, 15875 meat for storage" and under it the word "Barral"—I signed that name "Barral" there. I came to sign it because I was the closest to Mr. Jacky and he says, "Which name shall I put down?" I said, "The meat belongs to this fellow over there." He was dressing and I pointed to Barral. Jacky says, "who is going to sign?" and I told Barral in French to come and sign your note, and he says, "Go ahead and sign it." I signed it.

I never asked Barral at any time if he could get any meat for me. I never asked him at any time if he could get me any meat off the ship or Government meat. The first time that I knew that the meat that was in this truck or the meat that was in storage at Jacky's place or that the meat he said he was going to get me was Government meat was when I came to the truck after those big boxes were unloaded.

On January 23 I got back to the Normandie Restaurant about five minutes to eleven and was arrested about ten minutes to one. I was arrested at the door of the restaurant. [201] I heard the bell ring and went to open the door. There were five men there and they said to me "FBI" or "Federal Bureau of Investigation" or something like that,

and they asked me if I was Mr. Patron. I told them no, that I was Mr. Chevillard. They grabbed me by the arm and put the handcuffs on and felt through my pockets. I said, "What is it?" and they said, "You know," and that is all. I told the agents where Mr. Patron was. None of these agents told me what his name was. They took me to the FBI headquarters where I was kept a little over four hours during which they was questioning me from every side. First two men questioned me and then there was another one, and one would go out and another would come, and sometimes there were four men and a man from outside would come inside and open a door and say, "Are you co-operating?" and then he would go out and the man in front of me would start again and another would put me another question and I was arguing all the time and I was kind of lost.

That is my name, Fernand Chevillard, on the bottom of each page of U. S. Exhibit No. 18, and I signed that statement. I did not know the names of the two agents who have been identified in this trial as Ronald A. Wilson and Lee M. Fallaw. When they took me to the Field Office nobody told me I had a right to have a lawyer. I asked if I could have a lawyer and they said, "Yes," and I said I would like to use a phone and the other agent said, "Why don't you make a statement," and I said that I will give him a statement. They told me I could use the phone, but did not show me where the phone was. Nobody asked me whether any promises or inducements were made to me for the

purpose of making the statement. I don't recall that I stated to the agents that night that "about two or three months ago Barral offered to sell me some meat off his ship, [202] but I did not buy any."

Q. The statement goes on and contains this statement: "About Thursday or Friday, January 18th or 19th, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship. 30,000 pounds in all, but he wouldn't need it all on the trip and wanted to sell 15,000 pounds of it before it was put on the ship."

Did you tell that to the agents?

A. No, not like that, no.

Q. Did Barral ever tell you at any time that there was to be meat bought for the ship and that he wanted to sell 15,000 pounds of that meat that was to be paid by the ship?

A. No, sir.

Q. What did you tell the agents about Barral telling you anything about any meat to be sold?

A. The only thing I told the agent that he wanted to sell me some meat, but I was broke and I couldn't buy it.

Q. Did they ask you if Barral told you where the meat was coming from?

A. I don't remember.

Q. Did they ask you whether or not Barral told you it was meat for the ship?

A. I don't know.

Q. What is the answer

A. I don't know.

Q. Now, the statement on page 2 contains this statement:

"This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself."

Did you have any discussion with the agents about that? [203]

A. I didn't want to sign because of that certain paragraph there in the statement, because I fight for the word—twenty minutes or a half hour it seemed. There was never no agreement. I never had no agreement with Barral and Patron together and I tried to point it out to them. It was wrong. So one agent would say, when you are talking about something, and suppose he says, "Barral tells you, are you going to buy something? And you say, Oh, maybe." He says, "That is an agreement, isn't it?"

And another would point me out something else and ask me if it is an agreement. He kept saying, "That is an agreement."

Q. You say that discussion went on for fifteen or twenty or thirty minutes, at least. Tell me this: How long had they been questioning you before anybody started to write this statement?

A. Well, they wrote a few lines, about ten lines.

Mr. Hammack: I submit the answer is not responsive to the question.

Mr. Friedman: Let's hear the whole answer, maybe it is.

A. They didn't write anything for a long time.

Mr. Friedman: Q. What happened during that time when nothing was being written?

A. They were telling me all kinds of things and I was denying and I says, "You can't tell me something I don't want to say. I can't tell you that when I didn't do it." Then they started again.

Q. Then they would write some more, is that right? A. That's right.

The statement was finally finished after five o'clock in the morning.

Q. Did you read the statement?

A. No. [204]

Q. You signed it, though? A. Yes.

Q. Why did you sign it?

A. Because I told them, "I am all in and I don't care what you put in there." I started to argue again about the money side. They said I was going to get something out of it. They said, "You were going to get something. Where were you going to get?" They said, "You were going to get something."

I said, "All right, give me this and I will sign it." And that is all.

Q. That was all?

A. That was all, that's right.

I never had any discussion with Barral as to whether he should ever get anything out of this meat transaction. I never agreed with Barral that I would pay anything for the meat. I never had any understanding or discussion with Barral whereby I would get any profit if I sold any of this meat for him.

Cross Examination

By Mr. Hammack:

I have known Barral about six months. He did come to my restaurant, the Normandie Restaurant. That part of the statement which said that Barral would come to the Normandie Restaurant to see me and my partner is correct. I knew that Barral is a chef on ships and that portion of the statement which says that I knew Barral was a chief on ships is right. Barral first talked to me about meat the first time he came to the Normandie. That portion of the statement which says, "About two or three months ago" Barral offered to sell me some meat off of his ship and I did not buy any is correct except he never mentioned about the ship. The portion of the statement which says that about [205] Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie and told Patron and me that he was going to have about 15,000 pounds of meat I think is right. As to that portion of the statement which says, "That this meat is to be bought for the ship 35,000 pounds in all, but he wouldn't need it all on the trip and wanted to sell 15,000 pounds," he never mentioned the ship. Never said it was for the ship. I asked Barral where he was going to get 15,000 pounds of meat and he said "Wholesale butcher or manager." I didn't ask Barral where he was going to get the points for 15,000 pounds of meat. I well knew that you need points to obtain meat. I know that even a housewife has to have points in order to buy meat.

Q. Barral offered to sell me 15,000 pounds of

New York cuts, filets, rib and lamb at 40c per pound. He said he wanted to sell the whole 15,000 pounds at the same time." Had you at any time discussed the price of this meat?

A. It was not done like that.

Q. How was it done?

A. He would come to me and say, "I will sell you some meat. I will sell it to you if you want it. I will let you have it for 35 or 40 cents." I never answered once to him yes or no. I said, "Don't bother me, please." That was my answer to him continually.

I never asked Barral where he was going to get the meat to sell to Mr. Kinelle. I never sent Mr. Kinelle. He said, "I know someone who wants to sell some meat."

I talked to Kinelle about January 18 and I saw Barral on January 22. I didn't send Barral to Mr. Kinelle. I didn't say to Barral, "I know a man by the name of Kinelle who would like to buy some meat, because I didn't want to bother no more. It was not like it says in the statement about my making inquiries of Angelo Vincenzini. I did see [206] Vincenzini at his butcher shop in South San Francisco. I do not stop there to see Vincenzini every day. At that time I couldn't find no chickens for about ten days. So I thought by chance I will stop here and ask about chicken. It was about a year since I bought chickens from Vincenzini. I had no occasion to buy any before. I found all I wanted in town. I talked to Vincenzini on January 21, or 22, 1945. I don't know where Vincenzini lives. Vincenzini told

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me he had some chickens he could let me have. He told me I could have ten or twenty dozen, but that he didn't have them there, that they were in storage in Millbrae. I says, "You have storage?" He says, "That is right, a public storage." I asked him if it was a big storage and said that some guy wants to store some meat. He asked me what he was going to do with it and I says. "I think he is going to sell it." I did not go over to the Millbrae Dairy to get the chickens. Vincenzini did not get the chickens for me. I did not actually buy the chickens because it was five o'clock and the dinners start about 5:30 in the Normandie and I wouldn't have time that day to get it, and I thought I would get them tomorrow. On the night of the 22nd I came back to the Normandie about 1:30 and slept there. My partner and I take turns. Sometimes I sleep there and sometimes he sleeps there. I didn't pick up the chickens on the 23rd, but I called up four thirty or five o'clock. I never got the chickens. The portion of the statement which says that Vincenzini told me he thought I could get storage space for the meat at Millbrae is right. So is the portion which says that I saw him in South San Francisco, on January 22, and he personally called the Millbrae Dairy. The portion of the statement is right which says that Vincenzini advised me there was storage space there which I could get.

Q. "That night at the Normandie Restaurant I told Barral [207] and Patron there was storage space available." You did that, did you not?

A. I didn't say like that.

Q. Oh.

A. I say like that, "I think there is a place down the peninsula that has room, but I am not sure."

I drew a map for Barral at ten minutes after twelve when Barral ran after me and said for me at least to give him the address of the storage place. I drew the map at the Normandie Restaurant on the night of the 22nd. It is correct that on January 23 I was at 35 Lake Street when I got a phone call about 4:30 p. m. from Mrs. Patron. I went to Millbrae on the night of January 23 because Mrs. Patron told me my partner was gone there. My first thought was, "I bet you that he has gone with Barral." The reason why I thought he had gone to Millbrae was because that was the only name that had been mentioned when Barral asked me for the map. I thought Barral had persuaded my partner to go there. I imagined Barral came and told them he had the truck or something. I went to Millbrae because I wanted to find out what happened. Patron was my partner and if he is going to do a mistake I was going to try to stop him. I wanted to find out because Barral was so tricky and lied in so many things. It was for my protection to go over and find out. I was suspecting something. I wasn't sure of anything. I called South San Francisco and asked for Mr. Angelo Vincenzini and he was not there. I did so because I see that this is my chance to pick up the chickens. Angelo Vincenzini's brother was there and I said, "Are the chickens down at your place or are they still at Millbrae?" And he said he couldn't tell me, that his brother wasn't there and wouldn't

be back until six or 6:30. I went and got some coffee and I called again South San Francisco to find Angelo Vincenzini to see if I could [208] pick up the chickens. I couldn't find Angelo nowhere. When I saw Patron I asked him what was up. That is when he told me, "Barral came and pestered me and wants me to help him with the truck." I asked what kind of a truck and he says, "I don't know." Patron and I waited about an hour and a half for the truck.

The book you show me is my notebook. The figures in it "15,875" that is the number that Jacky gave me. That is supposed to be the weight of what is in the truck. I was interested in that fact because Barral told me to check up the merchandise for him.

I started to check and when I discovered I had been misled in some way I had a long argument with Barral and he said if I didn't want, to drop everything and just check out. When we were more than half way through the truck unloading was when I saw it was Government meat. I stopped checking right there. I did not leave. I did not wait for the weight. Barral told me to take the total so I took it down. The sheet you show me is where I wrote the total in my book, and also reads "Pierre Barral, 415 Jones, 15875 pounds of meat" was on my person when I was arrested. I wrote the name Barral on there. That is all in my handwriting.

Redirect Examination

By Mr. Friedman:

Q. One more thing: In this statement that Mr. Hammack and I have questioned you about, there

appears this set of words: "Barral had told Patron and me that the meat belonged to the Merchant Marine." Did Barral ever tell you that?

A. No, it was all new to me about the Merchant Marine. He was always coming in civilian clothes.

Q. I am not asking you that. Listen to what I said: "Barral had told Patron and me that the meat belonged to the Merchant Marine."

A. No, no, I didn't say it that way.

Q. Did you have any discussion with the men who took [209] your statement about the Merchant Marine at all?

A. Yes.

Q. What was said?

A. They pointed to me, they says, "Do you know Barral is in the Merchant Marine? That is the Government." I says, "I don't know if he is in the Government or not. I always see him in civilian clothes. I don't know Merchant Marine or——"

Q. Did you tell the members of the F.B.I. that Barral told you that the meat belonged to the Merchant Marine?

A. No, not that one, no.

Mr. Friedman: That's all.

Defendant Chevillard Rests.

Defendant Patron Rests.

Testimony of George Halstead for the United States

GEORGE HALSTEAD,

recalled by the United States, in rebuttal, having been previously sworn, testified in substance as follows:

Direct Examination

By Mr. Hammack:

I am familiar with the fact that an order for meat was placed with the Ed Heuck Company for the Sea Perch for the voyage which she was going out on about the 23rd or 24th of January, 1945. There was an order placed with the Ed Heuck Meat Company for the Sea Perch for an earlier voyage sometime in September or October, 1944. The chief steward on the Sea Perch gets a copy of the invoices of the orders for meat and for all supplies that have been ordered and supplied to the steamship. Mr. Rodriguez was the chief steward on the Sea Perch in October and at that time had copies of invoices from the Ed Heuck Company. I have here two invoices for the October voyage. This is an invoice [210] covering the meat delivered from the Ed Heuck Company to the Sea Perch on voyage two, on which she left on October 29. A carbon copy of that invoice was delivered to Mr. Rodriguez.

(The invoice was marked U. S. Exhibit 22 in evidence solely for the purpose of showing the name of the dealer.)

Thereupon an adjournment was taken until Thursday, March 15, 1945, at ten a. m., whereupon the following proceedings were had:

Government Rests.

All Defendants Rest.

Exception No. 29

Thereupon Mr. Friedman, on behalf of the defendant George Patron and on behalf of the defendant Fernand Chevillard moved the court to direct the jury to return the following verdicts, to wit: A verdict finding the defendant Patron not guilty on Count One of the indictment, a verdict finding the defendant Patron not guilty on Count Two of the indictment, a verdict finding the defendant Patron not guilty on Count Three of the indictment, a verdict finding the defendant Chevillard not guilty on Count One of the indictment, a verdict finding the defendant Chevillard not guilty on Count Two of the indictment, a verdict finding the defendant Chevillard not guilty on Count Three of the indictment. Each of said motions was made upon the ground that all of the evidence introduced in the case was and is insufficient to support either a verdict or judgment of guilty as to each defendant and that no offense sought to be charged in each count of the indictment had been proved by the evidence as against the defendant Patron or against the defendant Chevillard. The court denied each of said motions for directed verdicts to which ruling of the court each of said defendants excepted. [211]

Thereupon the cause was argued by the respective counsel for the parties and on March 16, 1945, the court delivered the following: [212]

CHARGE TO THE JURY

The Court (orally): Ladies and gentlemen of the jury, you have listened at considerable length to the

evidence in this case and to the arguments of the attorneys, and I should like you now to give your attention to the Court for some advice and instructions to you as to the principles of law that are applicable in a case of this kind, and to guide your deliberations.

We started this case with seven defendants named in the three counts of the indictment. Two of the defendants, the defendant Barral and the defendant De Angury, pleaded guilty. Two of the defendants the defendant Vincenzini and the defendant Jacky have been dismissed by the Court, and you will therefore bring in a verdict of not guilty as to the two defendants that I have last named, namely, Jacky and Vincenzini. You are called upon in this case, therefore, at this stage, to determine the guilt or innocence of the three remaining defendants, Rodriguez, Patron and Chevillard.

The fact that two defendants pleaded guilty creates no presumption of any kind as to the guilt or innocence of the three defendants now on trial. That is the only issue. That issue, as to the guilt of the three remaining defendants, is to be determined by you only upon the evidence produced here, guided by the law as the Court will give it to you. Likewise, you must keep in mind that the action of the Court in dismissing Vincenzini and Jacky does not indicate any opinion of the Court as to the guilt or innocence of the three defendants remaining on trial, nor does it create any presumption as to the guilt or the innocence of the three defendants on trial. As I have stated, there are three defendants that

are still on trial, all of them charged in the indictment with having violated laws of the United States. I think it is needless to point [213] out, yet I will do so, that although all of the three defendants are charged jointly, the guilt or innocence of each defendant must be determined by the jury separately. Each has the same rights as though he were being tried alone.

Now, during the course of such instructions and advice as I may give you, I will perhaps use the word “defendants” or “defendant”—and I will have to use it somewhat frequently—and unless I name some particular defendant you will understand that each defendant is thus specifically referred to; and any instructions given referring to “defendants” or “defendant” generally will be understood and considered by you as referring to each defendant separately and individually.

In the first place, let me call your attention to some general rules and principles of law that are applicable to trials in the Federal court in criminal cases. First of all, you, the jury, and myself, the judge of the Court, have different functions. It is your duty and your province and your responsibility to determine the facts of the case, to determine the guilt or innocence of the three defendants, and each of them, on trial. With that function the Court has no concern, and that is exclusively your job.

The duty of the Court is to advise you as to the law of the case, and it is also your duty to follow the instructions that the Court gives you as to the law of the case. Now, the Court expresses no opinion as to the guilt or innocence of the defendants. As

has been stated to you, the jury system is an old system, historically and traditionally, and by law that is exclusively your function.

In the course of the trial, as I stated to you at one time during the trial, the Court has been called upon to make rulings upon objections to the introduction of testimony and in connection with motions to strike out testimony. The Court [214] made comment at times and gave its reason for making such rulings. From that you are not to infer in any manner that the Court has any opinion or intended to express any opinion as to the issue submitted to you for decision, namely, the guilt or innocence of the defendants. Nor are you to understand from anything that the Court says during the course of the instructions that the Court is intending to express any opinion as to the guilt or innocence of the defendants. That is not the intention.

You must exclude in your deliberations in this case both sympathy and prejudice. You are not to concern yourself with the matter of punishment of the defendants or any of them in the event of a verdict of guilty. The matter of punishment is for the Court. Your province is to determine, as I have stated, only the matter of the guilt or innocence of the defendants.

I told you at the time of your impanelment as jurors, and I repeat it now, that there is no presumption whatever arises because the grand jury has indicted the defendants in this case that the defendants, or any of them, are guilty. At all stages of the proceeding the defendants and each of them are presumed to be innocent. This presumption con-

tinues until all of the evidence introduced for or on behalf of the government proves the guilt of the defendants, or any of them, beyond a reasonable doubt.

Now, you should know what we mean when we speak of the term "reasonable doubt." A reasonable doubt is defined to be such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

Let me say to you that there is almost always difficulty in proving a fact to an absolute and complete certainty. Therefore, you should keep in mind that a reasonable doubt is not [215] a mere possible or imaginary doubt, or a bare conjecture. The rule of reasonable doubt applies to every material element of the offense charged.

Whether you believe or you do not believe the witnesses who have testified in this case, and the weight to be attached to their testimony respectively is a matter for your sole and exclusive judgment.

You start out with the presumption, namely, that a witness is presumed to speak the truth. However, this presumption may be negated by the manner in which he testifies, by the character of his testimony, by contradictory evidence, by his motive, or by evidence as to his character and reputation for truth, honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony or to discard and reject the whole or any part thereof.

If it is shown that a witness has testified falsely on any material matter, you should distrust his tes-

timony in other particulars, and in that event you are free to reject all of the witness' testimony. It is your overall duty to scrutinize carefully the testimony given, and in so doing to consider the following elements:

The circumstances under which the witness testified; his demeanor and manner on the witness stand; his intelligence; the connection or relationship which he bears to the government or to the defendants; the manner in which he might be affected by the verdict; the extent to which he is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness.

It is your duty to disregard any testimony stricken out by the Court, or any testimony to which an objection has been [216] sustained. You should receive oral admissions with caution.

The attorneys in their argument to you in this case, ladies and gentlemen, have commented upon and argued upon the facts. If you find any variance between the facts testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance, you must consider only the facts testified to by the witnesses.

You may find discrepancies or inconsistencies in the testimony of a witness, or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material and do not affect the true issues of this case, and if they do not reasonably bear upon the guilt or innocence of the defendants, do not waste your time in considering

them. You should use your good sense just as you would in acting upon the most vital and important matters pertaining to your own affairs. Resolve the facts of this case according to calm, deliberate and cautious judgment, in the light of your own knowledge of the natural tendencies and propensities of human beings.

Remember that the defendant is entitled to any reasonable doubt you may have in your minds, but at the same time remember that if you have no such doubt the Government is entitled to a verdict.

Each of the defendants in this case has testified in his own behalf. That being so, you will determine the credibility of each of the defendants according to the same standards that are applied to any other witness. These standards I have already pointed out to you. You may, in addition, consider in this connection the interest each of the defendants may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict.

There has been some mention made of circumstantial evidence. [217] I, therefore, believe that it is proper for the Court to define that to you.

I will say, in the first place, there are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such

circumstantial evidence may consist of statements by the defendant, plans laid for the commission of the crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

In cases of circumstantial evidence facts should be proven which are not only consistent with the guilt of the defendant but inconsistent with any other reasonable hypothesis.

In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty. Such intent is merely the [218] purpose or willingness to commit such act. It does not require a knowledge that such act is a violation of law. However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must

also be presumed to intend all the natural, probable and usual consequences of his own act.

Every person of legal responsibility who voluntarily cooperates with or aids, or assists, or advises, or encourages another in the commission of a crime is an accomplice, without regard to the degree of his guilt.

An accomplice is defined to be one concerned with others in the commission of a crime. It is a settled rule of law in this country that even accomplices in the commission of a crime are competent witnesses, and that the government has the right to use them as such; it is the duty of the court to admit their testimony and that of the jury to consider it. The testimony of accomplices, however, is always to be received with caution and weighed and scrutinized with great care, and the jury should not rely on it unsupported, unless it produces in their minds a most positive conviction of its truth. If it does, the jury should act upon it.

Whoever directly commits any act constituting an offense defined in any law of the United States, or whoever aids, abets, counsels, induces or procures its commission, is a principal and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of the law is a principal, as is also one who either aids, abets, counsels, induces, or procures the doing of that act.

The word "aid" means to help, to support, or to assist.

The word "abet" means to instigate or encourage by aid or countenance, or to contribute.

It is essential to the guilt of a person charged with [219] aiding and abetting the commission of the crime that such person's acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

A person who knowingly renders assistance, cooperation, and encouragement in the commission of an offense is one who aids and abets in the commission.

Now, I think, ladies and gentlemen, that about gives you the general principles of law that are applicable in the trial of a case of this kind. I have some further instructions to give you that particularly pertain to the offenses charged in this indictment.

The pertinent provision of the statute under which the defendants on trial are charged in the first and second counts of the indictment is as follows. It is a part of section 80 of title 18 of the United States Code:

“Whoever shall knowingly and wilfully make or cause to be made any false or fraudulent statements or representations in any manner within the jurisdiction of any department or agency of the United States, or whoever shall knowingly and wilfully conceal or cover up by any trick, scheme or device a material fact in any matter within the jurisdiction of any department or agency of the United States, shall be punished” in the manner thereafter provided in the statute.

Now, the first count of this indictment, as I ad-

vised you at the time of the impanelment, charges the defendants with making a false or fraudulent statement or representation in connection with a matter within the jurisdiction of a department or agency of the United States, and the second count of the indictment charges the defendants with knowingly concealing or covering up by a trick, scheme or device a material fact [220] within the jurisdiction of a department or agency of the United States. The first count charges the false representation of a material fact. The second count charges the covering up and concealment of a material fact within the jurisdiction of a department or agency of the United States.

Now, the particulars in which the indictment charges the defendants with the offense under this statute in the first count is, in substance, that the defendants knowingly and wilfully falsely stated and represented, or caused to be represented, to an agency of the United States that approximately 64,793 pounds of meat had been delivered by the Ed Heuck Company to the War Shipping Administration, and had been received by the War Shipping Administration, when in truth and in fact only approximately 46,961 pounds had been delivered.

The substance of the charge in the second count is that the defendants wilfully and knowingly covered up and concealed the fact that 64,793 pounds had not been delivered to an agency of the United States, and that 17,832 pounds had been diverted.

Now, ladies and gentlemen of the jury, I instruct you if you are convinced beyond a reasonable doubt

and to a moral certainty that the defendants, or any of them, performed the acts which I just described to you set out in the indictment in this case, you may find them, or any of them, guilty. If you are not convinced beyond a reasonable doubt and to a moral certainty then you will find the defendants not guilty under either or both of the two counts of the indictment as described to you.

In order to establish a violation of the statute I have just read to you, and with which we are here concerned, the government is not required to show that the War Shipping Administration lost money or property as a result of the alleged [221] acts of the defendants, nor is it necessary to show that the War Shipping Administration was deceived thereby. Proof beyond a reasonable doubt and to a moral certainty of the knowingly and wilfully making or causing to be made of a false or fraudulent statement or representation in a matter within the jurisdiction of the War Shipping Administration, establishes a violation of the statute.

I wish to instruct you at this time that the War Shipping Administration is and was at the time of the events described in the indictment, an agency or department of the United States. In supplying and operating the steamship *Sea Perch* the United Fruit Company acted as agent of the United States. In ordering and taking delivery of the meat described in the indictment from the Heuck Company, the United Fruit Company acted as agent of the War Shipping Administration, which in turn was an

agency or department of the United States Government.

The law under which the defendants are charged in the third count of the indictment, commonly known as the conspiracy count of the indictment, is known and described as section 88 of title 18 of the United States Code, and it provides, in the pertinent parts, as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as the law provides.”

The third count of the indictment alleges in substance that beginning on or about the 16th day of January, 1945, the defendants wilfully and knowingly conspired and combined to commit offenses against the United States, to-wit, to defraud the United States in the manner following, to-wit. Then it [222] alleges that the defendants, knowing that the War Shipping Administration had placed a purchase order with the Heuck Company for approximately 64,793 pounds of meat for delivery to the War Shipping Administration, conspired, confederated and agreed together to cause the Heuck Company to present a claim, false in part, to the War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the defendants knew, only approximately 46,961 pounds of meat would actually be delivered.

Then it is further charged in the third count of the indictment that the defendants conspired to cause false statements to be made in the manner described in the first count of the indictment. Then the third count goes on further to charge the defendants with concealing by trick, scheme and device, a material fact within the jurisdiction of the War Shipping Administration, as more particularly described in the second count of the indictment. So that in the third count of the indictment there are three elements alleged, namely, confederating and conspiring together to cause the presenting of a false claim and securing payment from the United States therefor, and a conspiracy to commit the acts specifically charged in the first and second counts of the indictment.

Now, as the defendants are charged with conspiracy it is necessary for me to instruct you as to the law on the subject of conspiracy.

The law under which count 3 of the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty.

In order to establish the crime charged, it is necessary, first, that the conspiracy or agreement to commit the particular [223] offense against the United States, as alleged in the indictment, be established, and, secondly, to prove further that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof.

To constitute a conspiracy, it is not necessary that two or more persons should enter into an express agreement for the unlawful venture or scheme, or that they should directly state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendant was an active party thereto.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, under the third count of this indictment, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy, as charged in the indictment, was entered into between two or more of the defendants to violate the law of the United States in the manner described in the third count of the indictment. It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the government prove to your satisfaction, beyond a

reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the [224] defendants, or at their direction, or with their aid, to effect the object of the conspiracy.

Under the charge made, the conspiracy constitutes the offense, and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

I did not read to you, ladies and gentlemen, during the course of these instructions the overt acts which were charged in the third count of the indictment. I read them to you, however, at the time of your impanelment as jurors; and when I hereafter refer to the overt acts in the course of these instructions, I am referring to the overt acts that I read from the indictment during the time that I read the third count of the indictment.

Each party must be actuated by an intent to promote the common design in a case of conspiracy. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the [225] unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purposes and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterward. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts provide.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties

abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and [226] if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the

indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty. To this statement there is one exception, and that is, if before any overt act has been committed on the part of any conspirator, or at his suggestion, or with his aid or participation, any such conspirator withdraws from the conspiracy and wholly disassociates himself from the project or the carrying out thereof, he ceases to be a conspirator and is without guilt.

An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. But if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete; and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be [227] given in evidence, but proof of one of those charged in the indictments is indispensable.

Now, ladies and gentlemen, you have been burdened with a lot of law, but it is necessary that all of these matters be brought to your attention, and that you be adequately instructed on every phase

of the law that is pertinent to the particular issue that you have to decide. Some times these instructions appear to be so long, but we cannot help that.

Ladies and gentlemen, you are expected to agree upon a verdict in this case. You should freely consult with one another in the jury room. If anyone should be convinced that your view of the case is erroneous, do not be stubborn, and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if after a full exchange of ideas you still believe you are right.

I wish to caution you that if during your deliberations it becomes necessary for you to communicate with the Court, or upon your return to Court, respecting any matter connected with the trial of this case, you should not indicate to the court in any manner how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the defendants, or any of them. This caution you should observe at all times after the case is submitted to you, and until you have reached a verdict.

Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous.

When you are pursuing your deliberations in the jury room, if you require or need the exhibits in the case, or any of them, you may so notify the court and they will be provided for you.

When you retire to the jury room to deliberate, you will [228] select one of your number as foreman or forelady, and he or she will sign your ver-

dict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this case in this court.

Has either side any exceptions to note?

Mr. Friedman: Yes, I have a few.

The Court: Very well, I will excuse the jury. Ladies and gentlemen, there is a legal matter that the Court desires to take up before finally submitting the case to you. You will therefore retire to the jury room. The case has not yet been submitted to you for decision, and therefore until it is you will observe the admonition of the Court that you are not to converse among yourselves or with any person on any subject connected with the trial of this case, nor are you to form or express an opinion thereon until the case has been finally submitted to you. You may take the jury out.

(Thereupon the jury retired.)

Mr. Friedman: We cannot follow the old rule and say "We note an exception to all of the Court's instructions." You cannot do that anymore. On behalf of the defendants Chevillard and Patron, separately, because I do not wish to re-state it, so it may be understood, I have an objection and exception separately in behalf of the defendant Chevillard and in behalf of the defendant Patron.

First, I wish to note an objection and exception to that portion of your Honor's charge defining the term "reasonable doubt," and in your definition that all that was required was that they do not feel satisfied to a moral certainty. Such is not

the law. Only moral certainty is required in determining the facts in a civil case, but more than that is required in a criminal case; not only moral certainty is required, but it must be moral certainty and beyond a reasonable doubt. Your [229] Honor did not so instruct the jury, and I note an exception in that regard.

Exception No. 30

Likewise, I wish to note an exception to that portion of your Honor's charge dealing with circumstantial evidence. Your Honor's instruction, I believe, so far as it went, was correct, but I did not hear your Honor instruct the jury on the doctrine of two hypotheses, that where circumstantial is relied upon to establish a matter that not only must the circumstances be consistent with guilt, but they must be inconsistent with any other reasonable hypothesis, and if they are equally consistent with the hypothesis of innocence the finding must be in favor of the defendant.

Exception No. 31

I next wish to note an objection and exception to that portion of your Honor's charge dealing with the definition of aiding and abetting. Your Honor read or told the jury in part what an aider and abettor was, but I believe that your Honor failed to instruct the jury that before anyone can be found guilty of aiding, abetting, counseling, advising, etc., in a criminal act, in which the party did not in fact commit the act, himself, that is the

act, which amounts to co-operation, aiding, assisting, must be done with a criminal intent, and must be done with the intent of having the ultimate act actually done and accomplished. I think your Honor omitted that in your instructions, and I note an exception in that respect.

Exception No. 32

I likewise desire to note an exception to your Honor's instruction to the jury as to the elements involved in the third count of the indictment. Your Honor instructed the jury that the third count of the indictment involved a conspiracy to commit several acts, to-wit, to defraud the United States, to make a false representation to the War Shipping Administration, to resort to a trick, scheme or device for the purpose of concealing a material fact from the War Shipping [230] Board, etc. The indictment, as I read the third count, states specifically that the defendants are charged with the offenses, to-wit, to defraud the United States in violation of title 18, USCA, section 80, and that the balance of the indictment simply alleges the manner and means in which they were to defraud the United States, and that the portion that relates to the false claim and resorting to the trick and device of getting a receipt to be signed are not the things that they are charged with conspiring, but they are merely stated as the means whereby the sole object of the conspiracy, to-wit, to defraud the United States, was accomplished. As I stated, I desire to note an exception.

Exception No. 33

I likewise desire to note an exception to your Honor's refusal to give defendants' requested instruction No. 3, which states that the jury has a right to consider in determining the credibility of the defendant Barral the fact that he has pleaded guilty, and the fact that judgment has not been pronounced upon him, and the fact that he is testifying under the expectation of immunity or leniency as to the charges to which he has pleaded guilty; that that goes to his credibility and can be considered by the jury in determining credibility.

I likewise desire to note an exception to the refusal of the Court to give defendants' instruction No. 6, of Defendants' Requested Instructions, which deals with the first count of the indictment, and amplifies what I consider to be a self-evident proposition, that before the defendant Chevillard or Patron can be guilty of the offense set forth in count 1 of the indictment, provided that somebody else actually made the false statement to the War Shipping Administration, it must be established that it was done with the knowledge of both Chevillard and Patron, and, stated conversely, that it was done with their knowledge or consent, either one of them.

I likewise desire to note an exception to the Court's refusal to give defendants' requested instruction No. 7, which deals with the definition of principal, and with aiding and abetting, and states that if any such false statement was made to the War Shipping Administration, and if the defend-

ant Chevillard had no knowledge thereof and did not actually aid, abet, counsel, command, induce or procure such other person to make such statement, that he could not be guilty under count 1, if he did not make the statement, himself.

I desire to take an exception to the failure of the court to give requested instruction No. 8. No. 7 was as to defendant Chevillard, but this is as to the defendant Patron.

I likewise desire to note an exception to the refusal of the Court to give defendants' requested instruction No. 10, which deals with the question of criminal intent, so far as count 1 of the indictment is concerned, and which in effect would have told the jury that the intent involved is a specific intent to defraud the United States, and that the mere making of a false representation is immaterial unless accompanied with the criminal intent to defraud the United States, or the War Shipping Administration.

The Court: It is not necessary for you to state the substance of the instructions that you are taking exception to. Just refer to them by number.

Mr. Friedman: I have only done that for the record sufficient to call it to the Court's attention.

The Court: Where you are taking an exception to the refusal to give a requested instruction, just refer to it by number. I have your instructions before me.

Exception No. 34

Mr. Friedman: As long as that is understood I will do so. I desire to note an exception to the re-

fusal of the Court to give requested instruction No. 11. [232]

I likewise desire to note an exception to the refusal of the Court to give defendants' requested instruction No. 12.

Exception No. 35

I likewise desire to note an exception to the court's refusal to give requested instruction No. 13, and likewise requested instruction No. 14, which is the same instruction, one applying to Chevillard and one to Patron, and which has to do with their guilt of actually having done the things charged in count 2.

Exception No. 36

I likewise desire to note an exception to the refusal of the Court to give requested instruction No. 15, which has to do with knowledge on the part of the defendant of any false statement having been made to the War Shipping Administration.

Exception No. 37

Likewise, I desire to note an exception to the Court's refusal to give Defendants' requested instruction No. 19, which I might state, briefly, was a request to tell the jury what the defendants were not on trial for.

I also desire to note an exception to the failure of the Court to give requested instruction No. 22, which has to do with the liability of a person who joins a conspiracy after it has been formed.

I likewise desire to note an exception to the refusal of the Court to give requested instruction No. 23, which is an application of the principles involved in 22 as to the defendant Chevillard; likewise, I except to the refusal of the court to give requested instruction No. 24, which is an application of the principles involved in No. 22 as to the defendant Patron.

I desire to note an exception to the refusal of the Court to give requested instruction No. 33, which is that defendants are presumed to have a good character for the traits involved.

I desire to note an exception to the refusal of the Court to give requested instruction No. 35, which has to do with [233] the credibility of a witness' testimony is necessary in order to convict.

Exception No. 38

Lastly, I desire to note an exception to the refusal of the Court to give requested instruction No. 37.

I think that covers my exceptions.

Mr. Resner: With regard to the defendant Rodriguez, may it be taken that the same exceptions which Mr. Friedman has noted on behalf of Patron and Chevillard may be noted in behalf of the defendant Rodriguez, that is, both as to instructions given by your Honor, and those that your Honor failed to give, as long as ours in large part adopted Mr. Friedman's instructions. If that may be done it will save me from reading them in detail.

The Court: Let the record so show. As to my in-

struction in connection with circumstantial evidence, on any other reasonable hypothesis, I think I read it, and you may not have noted it. I may have left out that sentence at the end of my instruction, and so there will be no doubt about it, I will give it to the jury again. Bring the jury back.

(The jury was returned into court.)

The Court: Ladies and gentlemen, there was one instruction that I gave you relating to circumstantial evidence, and I am not certain as to whether or not I included all the elements in it that I intended to, and in order to save time and not have the Court Reporter go back and find precisely what I said, I am going to re-read my instruction on circumstantial evidence. By so doing I am not intending to emphasize that any more than any other instruction, but simply for the purpose of clarifying the situation as to whether or not I fully gave the instruction on circumstantial evidence that I intended to give.

There are two classes of evidence recognized and admitted [234] in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eyewitness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such circumstantial evidence may consist of statements by the defendant, plans laid for the commission of the

crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than the other class of evidence.

If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, or any of them, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

In cases of circumstantial evidence facts should be proven which are not only consistent with the guilt of the defendant but inconsistent with any other reasonable hypothesis.

Ladies and gentlemen, we have a form of verdict prepared for your convenience which sets forth the names of the defendants and number of counts, and there are blank spaces for you to fill out when you come to your determination of guilty or not guilty, as to each count of the indictment. This form has been prepared for your convenience only. It is not to indicate in any manner how you should decide the case, but, [235] as I have stated, it is a form prepared for your convenience. The jury may now retire.

That defendants' requested instructions numbered 3, 11, 13, 14, 15 19 and 37, referred to in the foregoing exceptions, which instructions the court refused to give to the jury are as follows: [236]

Requested Instruction No. 3

Two of the defendants in this case, Pierre Barral and Lucien L. DeAngury have taken the stand as witnesses in behalf of the Government. Each of these witnesses has pleaded guilty to the charges contained in the indictment. In considering the credibility to be given to each of these witnesses you have a right to take into consideration the fact that each of these men has pleaded guilty and is awaiting the pronouncement of judgment. You have a right to consider these facts in determining the bias that each of these witnesses may have against their co-defendants and in determining whether or not these two men are testifying under the expectation of immunity or leniency as to the charges to which they have pleaded guilty. If you determine that either of these men are testifying in favor of the Government due to any bias they may have against any other defendant in the case or under the expectation of any immunity or leniency, you have a right to consider such fact in determining the credibility of each such witness.

Requested Instruction No. 11

By the second count of the indictment on file herein the defendants are charged with knowingly, wilfully, unlawfully and feloniously, covering up

and concealing by a trick, scheme and device a material fact within the jurisdiction of the War Shipping Administration and that the material facts so covered and concealed by such trick and scheme and device are as follows: that the defendants knew that the War Shipping Administration had ordered from the Ed Heuck Company approximately 64,793 pounds of meat, to be delivered by the said Ed Heuck Company to the said War Shipping Administration; that possessing such knowledge the defendants diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use and with the intent to defraud the said War Shipping Administration, the defendants covered up and concealed the fact of said diversion and conversion of approximately 17,832 pounds of meat by the trick, scheme and device of signing and causing to be signed and issuing and causing to be issued by the said War Shipping Administration a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

Before you can find either the defendant Chevillard or the defendant Patron guilty on this second count of the indictment you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that such defendant did in fact sign or caused to be signed or issue or cause to be issued by the War Shipping Administration said receipt for approximately 64,793 pounds of meat. If the evidence established that the defendant Chevillard did not sign or cause to be signed and was not in-

strumental in having the said War Shipping Administration issue or caused to be issued such receipt, you must return a verdict finding the defendant Chevillard not guilty. If the evidence established that the defendant Patron did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt you must return a verdict finding the defendant Patron not guilty. If you have a reasonable doubt as to whether the defendant Chevillard or the defendant Patron signed or caused to be signed or was instrumental in having the War Shipping Administration issue or cause to be issued such receipt, you must resolve such doubt in favor of such defendant and acquit him on the second count of the indictment. [237]

Requested Instruction No. 13

Before you can find the defendant Chevillard guilty on count two of the indictment you must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant Chevillard signed and caused to be signed, or was instrumental in having the War Shipping Administration issue or cause to be issued a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat. If the evidence established that some person other than the defendant Chevillard issued or caused to be issued said receipt or was instrumental in having the War Shipping Administration issue or cause to be issued said receipt but that the defendant Chevillard had no knowledge thereof, and did not

abet, counsel, command, induce or procure such other person to do such act, you must return a verdict herein finding the defendant Chevillard not guilty on count two of the indictment.

Requested Instruction No. 14

Before you can find the defendant Patron guilty on count two of the indictment you must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant Patron signed and caused to be signed, or was instrumental in having the War Shipping Administration issue or cause to be issued a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat. If the evidence established that some person other than the defendant Patron issued or caused to be issued said receipt or was instrumental in having the War Shipping Administration issue or cause to be issued said receipt but that the defendant Patron had no knowledge thereof, and did not abet, counsel, command, induce or procure such other person to do such act, you must return a verdict herein finding the defendant Patron not guilty on count two of the indictment.

Requested Instruction No. 15

If you should find from the evidence that either the defendant Chevillard or the defendant Patron co-operated with some other defendant in this case for the purpose of finding a place to store approximately 17,000 pounds of meat that had been sent

by the Ed Heuck Company to the War Shipping Administration and if you should also find that either of these defendants likewise co-operated with some other defendant for the purpose of moving a truck in which said 17,000 pounds of meat was being transported, these facts even of themselves will not be sufficient in justifying you to return a verdict finding either Chevillard or Patron guilty of the offenses set forth in count one or count two of the indictment. Before either of these defendants can be found guilty on either count one or count two of the indictment the evidence must establish to a moral certainty and beyond a reasonable doubt that they had actual knowledge that the War Shipping Administration was going to be called upon to sign or caused to be signed or issue or caused to be issued, the alleged receipt for approximately 64,793 pounds of meat. If the defendant Chevillard and Patron did not know of this fact and did not act by way of counsel, advice, assisting or instigating the signing and issuing of such receipt you must find the defendants Chevillard and Patron not guilty on counts one and two of the indictment, no matter what else you may find the defendants did do relating to the matters and things set forth in the indictment. [238]

Requested Instruction No. 19

The defendants Chevillard and Patron are not on trial for having defrauded the Ed Heuck Company or for having conspired to steal from the Ed Heuck Company any meat. If you should find that

the defendants Chevillard and Patron did the particular acts set forth in count three of the indictment and that they had agreed between themselves or with other defendants in the case to do such things only for the purpose of stealing or diverting to their own use meat belonging to the Ed Heuck Company and had no intention of defrauding the United States or the War Shipping Administration, or concealing any material fact from the War Shipping Administration, or stealing any meat belonging to the War Shipping Administration, you must return a verdict finding the defendants Chevillard and Patron not guilty.

Requested Instruction No. 37

When independent facts and circumstances are relied to establish by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain in the facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned.

Thereupon the jury retired to deliberate upon the verdicts and subsequently returned into court with a verdict finding the defendant Chevillard not guilty on Count One and guilty on Counts Two and Three of the indictment, and a verdict finding the defendant George Patron not guilty on Count

One and guilty on Counts Two and Three of the indictment.

Thereafter the matter was continued until March 19, 1945, at which time the following proceedings were had:

Exception No. 39

Thereupon each of the defendants filed their motion with the court for a new trial as appears by the record herein, each of which said motions was by the court denied, to which denial each defendant then and there duly and regularly excepted.

Exception No. 40

Thereafter each defendant moved the court for an order for arrest of judgment as to Count Two of the indictment, as [239] appears by the record herein, each of which motions was denied by the court to which denial each defendant then and there duly and regularly excepted.

Thereupon the court imposed sentence upon each defendant.

Dated: May 10, 1945.

LEO R. FRIEDMAN

Attorney for Defendants
Chevillard and Patron

STIPULATION RE SETTling OF BILL OF
EXCEPTIONS, ETC.

It is hereby stipulated and agreed by and between the respective parties hereto that the fore-

going bill of exceptions on behalf of the defendants Fernand Chevillard and George Patron, on appeal herein to the United States Circuit Court of Appeals, in and for the Ninth Circuit, has been duly presented within the time allowed by law and the rules and orders of this court, and that the same is in proper form and conforms to the truth and sets forth all of the evidence and all of the proceedings relating to the trial of said defendants and that it may be settled, allowed, signed, and authenticated by the United States District Court and the Judge thereof as the true bill of exceptions on behalf of said defendant and that it may be made a part of the record in this cause.

Dated at San Francisco, California, May 25, 1945.

LEO R. FRIEDMAN

Attorney for said Defendants

VALENTINE C. HAMMACK

By JAMES E. BURNS

Special Assistant to the

Attorney General

[Endorsed]: Filed May 26, 1945. [241]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing bill of exceptions, duly proposed by the defendants Fernand Chevillard and George Patron and duly agreed upon by the respective

parties thereto, having been duly presented to the court within the time allowed and required by law and by the rules and orders of this court, duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and as conforming to the truth and as containing all of the evidence and proceedings relating to the trial and conviction, motion for a new trial and motion in arrest of judgment in said cause and as the true bill of exceptions herein and the same is hereby made a part of the record in this cause and the clerk of said court is hereby ordered to file the same and to transmit it to the Circuit Court of Appeals for the Ninth Circuit.

Dated: May 26th, 1945.

LOUIS E. GOODMAN

United States District Judge

Copy of the within proposed Bill of Exceptions received this 12th day of May, 1945.

VALENTINE C. HAMMACK

By MARGARET ANNAS

Special Assistant to the

Attorney General. [242]

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 29193-G

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

JULIO RODRIGUEZ,
Defendant and Appellant.

PROPOSED ADDITIONS TO BILL OF EX-
CEPTIONS PROPOSED BY APPEL-
LANTS ~~CHEVILLARD AND PATRON~~ *Re Rodriguez*

On page 97 in place of the sentence commencing
on line 1 with the word "The" and ending on line
4 with the word "defendants" insert the following:

Mr. Hammack: "I offer this in evidence as
against the defendant Rodriguez and for identifi-
cation as to the other defendants.

The Court: It may be admitted.

(The delivery receipt was marked U. S. Ex-
hibit 5 in evidence against Rodriguez and for
identification as against the remaining defend-
ants.)

Mr. Resner: What was Mr. Hammack's last
statement?

(The reporter read the record as requested.)

Mr. Resner: Am I to understand that this is—
I will withdraw the objection, your Honor, at this
time.

The Court: Of course, I think it is a misnomer, gentlemen. I know attorneys do it all the time. Something is not in evidence [243] for identification. It is either in evidence or it is not. The identification is merely on the paper so you will know what you are talking about.

Mr. Resner: Then I will object on behalf of the defendant Rodriguez on the ground that as to him this document is hearsay. I mean there is no showing here by anybody that he had at any time seen this, or that it was presented to him, or that he knew anything about it. This all went on between Mr. Hinman and Mr. Barral, the assistant steward, incidentally. There has not been a word connecting Mr. Rodriguez with this. It is not signed by him, nor ever shown to him.

Mr. Hammack: It has been testified, may it please your Honor, that the defendant Rodriguez made arrangements for it.

The Court (Referring to Exhibit 5): What is this right here?

Mr. Resner: That says "Bryant Nielsen." That is the signature apparently of the dock checker.

Mr. Hammack: That is correct, your Honor.

Mr. Resner: There is no showing against Rodriguez, no more so than against anybody else in the case, your Honor.

The Court: I will overrule the objection. You may have an exception. It may be admitted."

On page 165, line 29, insert the following:

DALLAS A. JOHNSON

testified further as a witness on behalf of the United States as follows:

Direct Examination

By Mr. Hammack:

"I first talked to Rodriguez on January 24, 1945, aboard the S.S. Sea Perch at Berth 1, outer harbor, Oakland Army Base, Oakland, California; and at that time and place I arrested him and took from him a notebook which I examined, and which contains a telephone number Tuxedo 6825, under which number is written the [244] words "Manager" and "Joe."

Special Exception No. 1

(Rodriguez)

Mr. Resner: I object to any further questions along that line. I want to make a motion to suppress this as having been taken from the defendant unlawfully, without any warrant for its being taken. It was taken illegally against the consent and wishes of the defendant here by the agents' admission and statement on the stand. He took it from the defendant Rodriguez.

The Court: Is that the basis of your motion?

Mr. Resner: My motion to suppress and my motion to exclude is upon that basis.

The Court: Upon the basis of the testimony of the witness?

Mr. Resner: So far, and the basis that there is no showing there was any warrant had for taking it.

The Court: I will deny the motion. You may have an exception."

The book was admitted in evidence and marked United States Exhibit No. 17.

Cross-Examination

By Mr. Resner:

"I boarded the Sea Perch approximately 1:30 a.m., January 24, 1945. I first saw Rodriguez at approximately 2:00 a.m. the same morning. I was in the company of another FBI agent whose name is Glenn Trofast. I did not have a warrant at that time for Mr. Rodriguez' arrest. I did not have a warrant to search him. I did not have a warrant to search his quarters. I took the book, Government Exhibit No. 17, from his person. I took a carbon copy and a pencil copy of the steward's department account of stores and requisitions. I think we took two letters which had been written to him. At the time I did not know whether they involved anything in connection with this case. It appeared as if they might. The letters had something to do with the case. They had [245] to do with the defendant's background and the people to whom he had been writing, and it also mentioned the fact that he had had some violent dispute with the Army authorities on a previous voyage concerning the amount of meat that he was feeding the troops. I do not believe it mentioned the meat specifically; it mentioned the fact that there had

been a complaint registered regarding the manner in which he was feeding the troops on the S. S. Sea Perch. I cannot produce the letters at the present time. I do not have them on me. It would be hard to say right now what else I took from Mr. Rodriguez. I do not think of anything else right now that I took from him.

Concerning the inventory, Mr. Rodriguez gave it to me and I took it from him. I told Mr. Rodriguez at the time that we had reason to believe that he had submitted a false inventory. I told Mr. Rodriguez that I would check the inventory against the supplies on the ship. I did not do that; I was unable to. Personally, I do not know whether the inventory is true or false. It is my opinion that it was false."

Redirect Examination

By Mr. Hammack:

"We did not take an inventory on the ship at that particular time because we placed Mr. Rodriguez under arrest, and we remained with him during that period until such time as he had been placed in the County Jail. The following morning an effort was made to take the inventory and it was found that the meat had been loaded into the lockers on board the ship and that other cargo had been piled on top of the hatches, and the vessel was due to sail in a few hours and we would have to hold the vessel up for a period of at least twenty-four hours, and perhaps more, to take an inventory. We considered it to be more to the benefit of the country

to have the troops that were going on that ship out to sea, en route to wherever they were going, rather than to hold up the ship and [246] detain the troops that were going overseas.”

On page 254, line No. 24, after the word “dealer” insert the following:

DALLAS A. JOHNSON

was recalled by the United States as a witness and testified as follows:

Cross-Examination

By Mr. Resner:

“When Mr. Rodriguez—when I first saw Mr. Rodriguez, he was sitting in the dining salon on the Sea Perch, and I am not positive, but I believe he was drinking a cup of coffee. I asked somebody outside the door if the gentleman inside was Mr. Rodriguez. I went into the dining salon and I said, “Is your name Mr. Rodriguez?” And he said, “Yes.” I asked him if he would mind stepping outside of the room for a few moments, and he stepped outside of the room, and at that time I said, “We are Federal officers. You are under arrest. We would like to see you for a few moments. We would like to talk to you for a few moments.” At that time he invited us down to his cabin on the ship. When we got into the cabin of the ship, that is, his cabin of the ship, we asked him to sit down, and we sat down, and we told him again at that time, he was moving about the room,

and we told him to sit down, as he was under arrest, and we didn't want him moving about the room. He sat down on a cushion, that is, a cushion affair that is part of the cabin, part of the seat, and we said, "We would like to talk to you for a few moments," and we spent the next fifteen or twenty minutes, approximately, getting—that is, asking—we asked him the questions and he gave us the answers, where he was born, his age, his physical description, his height and weight, whether or not he had ever been arrested——"

Special Exception No. 2
(Rodriguez)

Q. "What was his answer to the question of whether or not he had ever been arrested?"

Mr. Hammack: I am going to submit this is going too far beyond the scope of the direct examination.

The Court: I think so. Some of this was gone into on the direct case.

Mr. Resner: It has not, your Honor. He didn't go into that.

The Court: I don't want to argue about it, Mr. Resner. I won't allow you to take up the time of the Court and jury to listen to testimony that has already been given. It is not proper on rebuttal.

Mr. Resner: It was not asked on direct.

The Court: It was only asked on rebuttal as to certain questions. I feel it is beyond the limits of cross-examination to go into this.

Mr. Resner: I submit it was never gone into before, if you will look at the record.

The Court: I cannot see the materiality that the defendant was asked about his age and where he was born.

Mr. Resner: All right, let us pass that over.

Q. Let me ask you this: Tell me everything relevant to the questions of——

Mr. Hammack: Just a minute. I will renew my objection.

The Court: I will sustain the objection, that it is too broad, going into matters not covered in rebuttal.

Mr. Resner: May I have an exception?

The Court: You may have an exception."

By Mr. Resner:

"I made notes of the conversation aboard the ship with Mr. Rodriguez. The notes are part of the file of the FBI at 111 Sutter Street, San Francisco, California. I put in the notes that Mr. Rodriguez stated that the Tuxedo telephone number was a friend [248] of Rodriguez in New York City. I do not recall whether he told me that there were other numbers in the book of other friends in New York City. I told Mr. Rodriguez that he was involved with Barral in diverting a shipment of meat from the government. Rodriguez said, "Whatever Barral has done, I don't know anything about that."

I have here my notes taken both aboard the vessel and the field office at the FBI of a conversation that I testified to with Mr. Rodriguez wherein I

testified that he told me that the Tuxedo telephone number was of a friend of his in New York, and it does not appear in these notes. I believe I made reference to that testimony in some other notes. However, I could not find these other notes last night. My notes do not show that I told Mr. Rodriguez that he was charged as stated in the indictment, although I so testified. It does not appear in these notes that Rodriguez stated that the Tuxedo telephone number was that of a friend of his named "Joe." I believe I made some other notes containing some references to this incident. I looked for those notes and I have brought into Court everything I was able to find on the subject. I throw notes away every day. I cannot say whether I threw away notes concerning my conversation with Rodriguez or not."

Dated: July 20, 1945.

ANDERSEN & RESNER

HERBERT RESNER

Attorneys for Appellant

Julio Rodriguez

[Endorsed]: Filed July 28, 1945. [249]

At a Stated Term, to wit: The October Term, 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the fifth

day of July in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Francis A. Garrecht, Senior Circuit Judge, Presiding; Honorable Clifton Mathews, Circuit Judge; Honorable William Healy, Circuit Judge.

No. 11022

JULIO RODRIGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO SETTLE
AND FILE PROPOSED BILL OF EX-
CEPTIONS, ETC.

Upon consideration of the petition of appellant, for an extension of time within which to file proposed amendment to proposed Bill of Exceptions, and of the stipulation of counsel therefor, filed,

It Is Ordered that time within which appellant may have settled and filed his Bill of Exceptions, and filed his assignments of error be, and hereby is extended to and including July 20, 1945. [250]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS OF APPELLANT
JULIO RODRIGUEZ

Julio Rodriguez, defendant and appellant in the above cause, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered in the above cause against him and having duly given Notice of Appeal as provided by law, now hereby makes and files the following Assignment of Errors herein, upon which Appellant Julio Rodriguez will apply for a reversal of said judgment and sentence upon appeal, and Appellant Rodriguez further states that there is manifest error in the following particulars, to wit:

I.

Appellant Julio Rodriguez incorporates by this reference, without setting each of them out, each and every one of the exceptions noted herein and assigned as errors by the Appellants Chevillard and Patron, adopting as his numbers on such exceptions taken by said appellants the numbers used in the Assignment of Errors of said appellants, although Appellant Rodriguez will rely upon only [251] those Assignment of Errors which particularly apply to his case, and particularly the following:

1) That the Court erred in refusing to grant a directed verdict of not guilty upon Counts One, Two and Three of the indictment, which motion was made at the close of the government's case and

renewed upon the close of all evidence and testimony of the case. Said motion was made upon the ground that the evidence was insufficient to support a verdict of guilty against Appellant Rodriguez, and against any one or all of the counts of said indictment.

2) The Court erred in refusing to give the instructions requested by Appellant Rodriguez, and erred in giving other instructions, all of which is particularly set out in the Assignment of Errors of said Appellants Chevillard and Patron.

II.

That the Court erred in denying the motion for a directed verdict of not guilty upon Count One of the indictment, which motion was made at the conclusion of the government case, and renewed when all the evidence and testimony in the case had been completed. That said motion was based upon the ground that the evidence in the case was insufficient to support a verdict of guilty.

III.

That the Court erred in admitting into evidence United States Exhibit No. 5, the delivery receipt signed by Mr. Brandt-Neilsen, and on which the following proceedings occurred:

Mr. Resner: Then I will object on behalf of the defendant Rodriguez on the ground that as to him this document is hearsay. I mean there is no showing here by anybody that he had at any time seen this, or that it was presented to him, or that he

knew anything about it. This all went on between Mr. Hinman and Mr. Barral, the assistant steward, incidentally. There has not been a word connecting Mr. Rodriguez with this. It is not signed by him, [252] nor ever shown to him.

Mr. Hammack: It has been testified, may it please your Honor, that the defendant Rodriguez made arrangements for it.

The Court (Referring to Exhibit 5): What is this right here?

Mr. Resner: That says "Bryant Nielsen." That is the signature apparently of the dock checker.

Mr. Hammack: That is correct, your Honor.

Mr. Resner: There is no showing against Rodriguez, no more so than against anybody else in the case, your Honor.

The Court: I will overrule the objection. You may have an exception. It may be admitted.

IV.

That the Court erred in admitting into evidence United States Exhibit No. 17, the telephone memorandum book, and in denying Appellant Rodriguez' motion to suppress said exhibit and to have same excluded from evidence.

Wherefore, for the many manifest errors committed by the Court, the Defendant and Appellant Rodriguez, by his counsel, prays that the sentence, judgment and conviction imposed upon him be reversed and for such other and further relief as is meet and just in the premises.

Dated: July 20, 1945.

ANDERSEN & RESNER

Attorneys for Defendant

Julio Rodriguez

Receipt of a copy of the within Assignment of Errors is hereby admitted this 23 day of July, 1945.

LEO R. FRIEDMAN

Attorney for Defendants

Chevillard and Patron

VALENTINE C. HAMMACK

Assistant United States At-
torney

[Endorsed]: Filed July 23, 1945. [253]

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 29193-G

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

JULIO RODRIGUEZ,

Defendant and Appellant.

Stipulation Relating to Additions of Testimony
Applicable to Julio Rodriguez, Defendant and
Appellant, to Bill of Exceptions on File Herein
by Chevillard and Patron, Defendants and
Appellants, and United States of America,
Plaintiff and Appellee.

It is stipulated by and between United States of America, Plaintiff and Appellee, and Julio Rodriguez, Defendant and Appellant, that the Bill of Exceptions filed in behalf of appellants, Chevillard and Patron, may be deemed as the Bill of Exceptions filed in behalf of Julio Rodriguez, Defendants and Appellant, with the exception that there is attached thereto as a supplement transcript of certain testimony pertaining to the defendant and appellant, Julio Rodriguez, the correctness of which is stipulated to, and filed in behalf of defendant and appellant, Julio Rodriguez, under the caption, "Proposed Additions to Bill of Exceptions [254] Proposed by Appellants Chevillard and Patron."

Dated: July 24, 1945.

HERBERT RESNER

Attorney for Defendant and
Appellant Julio Rodriguez

VALENTINE C. HAMMACK

Special Assistant to the At-
torney General

Order of Court: The above stipulation of Counsel is hereby approved and the Bill of Exceptions applicable to Julio Rodriguez, Defendant and Appellant, is hereby settled according to the terms of said stipulation.

Dated: Jul 27 1945

FRANCIS A. GARRECHT

Presiding Judge of the United States Circuit Court
of Appeals, Ninth Circuit

[Endorsed]: Filed Jul 27 1945. Paul P. O'Brien,
Clerk.

A True Copy. Attest: Jul 27 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed July 28, 1945. [255]

[Title of Court and Cause.]

STIPULATION IN RE TRANSCRIPT AND
RECORD ON APPEAL

It is hereby stipulated by and between counsel for the respective parties hereto that there shall be one transcript and record on appeal herein insofar as the same is possible, and that the appellant Julio Rodriguez may use the Bill of Exceptions and such other pertinent papers as are filed by or on file concerning the appellants Chevillard and Patron, and that the appellant Rodriguez shall file such additional papers as are necessary as to him

alone in connection with such transcript and record on appeal.

Dated: San Francisco, California, July 25, 1945.

VALENTINE C. HAMMACK,

Special Assistant to the At-
torney General

HERBERT RESNER,

Attorney for Defendant and
Appellant Julio Rodriguez

LEO FRIEDMAN,

Attorney for Defendants and
Appellants Chevillard and
Patron

[Endorsed]: Filed July 26, 1945. [256]

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 29193-G

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

JULIO RODRIGUEZ,

Defendant and Appellant.

PRAECIPE

To the Clerk of Said Court:

Sir: Please prepare the transcript and record on appeal in connection with the appeal of Juilo

Rodriguez, defendant and appellant herein, using the Bill of Exceptions heretofore filed by appellants Chevillard and Patron and such other pleadings, papers, documents and orders on file herein as are included in said appellant's record and transcript on appeal, and also the following specific papers, orders and documents:

- (1) Demurrer of defendant Julio Rodriguez;
- (2) Order of Court overruling said Demurrer;
- (3) Plea of Not Guilty by defendant Julio Rodriguez;
- (4) Motion for directed verdict of Not Guilty by defendant Julio Rodriguez made upon the close of the Government's case; [257]
- (5) Minute Order of Court denying said Motion;
- (6) Motion for directed verdict of Not Guilty by defendant Julio Rodriguez made at the close of evidence in the entire case;
- (7) Minute Order of Court denying said Motion;
- (8) Order in re sentence of defendant Julio Rodriguez;
- (9) Judgment against defendant Julio Rodriguez;
- (10) Notice of appeal by Rodriguez;
- (11) "Proposed Additions to Bill of Exceptions Proposed by Appellants Chevillard and Patron" filed by defendant Rodriguez;
- (12) Assignment of Errors of appellant Julio Rodriguez;
- (13) Stipulation between Valentine C. Ham-

mack, Special Assistant to the Attorney General, and Herbert Resner, Attorney for Rodriguez, relating to additions of testimony to Bill of Exceptions proposed by appellants Chevillard and Patron; and order of Circuit Court of Appeal;

(14) Stipulation between all counsel relating to one record on appeal.

HERBERT RESNER

Attorney for Defendant and
Appellant Julio .Rodriguez

Dated: July 25, 1945.

[Endorsed]: Filed July 26, 1945. [258]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 258 pages, numbered from 1 to 258, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The United States of America vs. Fernand Chevillard, George Patron and Julio Rodriguez No. 29193 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$19.25 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 18th day of September, A. D. 1945.

[Seal]

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [259]

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. No. 11018. Fernand Chevillard and George Patron, Appellant, vs. United States of America, Appellee, vs. No. 11022, Julio Rodriguez, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California Southern Division.

Filed September 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11018

FERNAND CHEVILLARD and GEORGE
PATRON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS RELIED ON AND
DESIGNATION OF PARTS OF TRAN-
SCRIPT TO BE PRINTED

Come now appellants above named and advise the Court that on their appeal they intend to rely on each and all of the points specified as errors in the assignment of errors heretofore filed by appellants, special reference to said assignment of errors being hereby made and by said reference incorporated herein.

Appellants designate the entire record be printed

in that they believe that the same is necessary to fully support and present their position on appeal.

Dated: May 29, 1945.

LEO R. FRIEDMAN

Attorney for Appellants

Copy of the foregoing Statement, etc., received this 29th day of May, 1945.

VALENTINE C. HAMMACK

Special Assistant to the At-
torney General

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien, Clerk.

No. 11018

United States
Circuit Court of Appeals
For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief for Appellants
Fernand Chevillard and George Patron

LEO R. FRIEDMAN,

935 Russ Building,
San Francisco 4, California,

Attorney for Appellants.

FILED

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26 1945

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Jurisdictional Statement	3
(1) Jurisdiction of the District Court.....	3
(2) The jurisdiction of this Court upon appeal to review the judgment in question.....	3
(3) The pleadings necessary to show the existence of jurisdiction	3
(4) The facts disclosing the basis upon which it is con- tended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.....	3
Statement of the Case, Presenting Succinctly the Questions Involved and the Manner in Which They Are Raised.....	4
Specification of the Assigned Errors Relied Upon.....	62
Argument	63
1. The District Court erred in overruling the demurrers to the Indictment	63
(a) The Second Count of the indictment does not state facts constituting an offense.....	63
(b) The Second Count of the indictment is fatally de- fective because the receipt therein referred to is not set forth either according to its tenor or accord- ing to its substance.....	66
(c) The Third Count of the indictment does not state an offense	69
2. The evidence was insufficient to establish the offense set forth in Count Two of the indictment.....	73
3. The evidence was insufficient to establish the conspiracy set forth in Count Three of the indictment.....	82
4. The Court erred in refusing to direct the witness Hin- man to produce the books of the Ed. Heuck Co.....	87
5. The Court erred in limiting the cross-examination of the witness Dean Heuck.....	89

	Page
6. The Court erred in limiting the cross-examination of the witness Barral.....	90
7. The Court erred in admitting the signed statement of the defendant Chevillard.....	95
8. The Court erred in refusing to strike out the signed statement of defendant Chevillard.....	97
10. The Court erred in its instructions as to who is an aider and abettor in the commission of crime.....	107
11. The Court erred in refusing to give appellants' requested Instruction No. 3.....	109
12. The Court erred in refusing to give appellants' requested Instruction No. 37.....	111
13. The Court erred in refusing to give appellants' requested Instruction No. 11.....	112
Conclusion	115

Table of Authorities Cited

CASES	Pages
Alford v. United States, 282 U.S. 687, 75 L.ed. 624	91, 92, 93, 94
Ashcraft v. Tennessee, 322 U.S. 143, 154, 88 L.ed. 1192, 1199	99, 103
Bain, Ex parte, 121 U.S. 1, 9, 30 L.ed. 849-852	72
Brown v. Mississippi, 297 U.S. 278, 80 L.ed. 682	99
Calderon v. United States, (C.C.A. 5) 279 Fed. 556, 558	114
Carney v. United States, (C.C.A. 8) 283 Fed. 398	114
Carr v. State, 28 Ala. App. 466, 187 So. 252-254	111
Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711	112
Dacche v. United States, 250 Fed. 566	97
Farkas v. United States, (C.C.A. 6) 2 Fed. (2d) 644	94
Flower v. United States, 116 Fed. 241	97
Goff v. United States, 257 Fed. 294	97
Gros v. United States, (C.C.A. 9) 136 Fed. (2d) 878	103, 107
Hendry v. United States, (C.C.A. 6) 233 Fed. 5, 18	114
Kassin v. United States, 87 Fed. (2d) 183	112
Lowe v. United States, (C.C.A. 5) 141 Fed. (2d) 1005	84
Mangum v. United States, 289 Fed. 213	97
McNabb v. United States, 318 U.S. 332, 340, 87 L.ed. 918, 824	99, 103, 104
Minner v. United States, (C.C.A. 10) 57 Fed. (2d) 506, 512	87
Mitchell v. Commonwealth, 225 Ky. 83, 7 S.W. (2d) 823	108
Moody v. People, 65 Colo. 339, 176 Pac. 476	68
Naftzger v. United States, 200 Fed. 494, 496	71, 72
Pettibone v. United States, 148 U.S. 197; 37 L.Ed. 419	65
Runnels v. United States, (C.C.A. 9) 138 Fed. (2d) 346	103, 104
Ryan v. United States, 99 Fed. (2d) 864	97
State v. Austin, 129 N.C. 534, 40 S.E. 4	111
State v. Dudley, 96 W.Va. 381, 123 S.E. 241	112
State v. Henderson, 135 Iowa 499, 113 N.W. 328	68
State v. McKee, 17 Utah 370, 53 Pac. 733	111

	Pages
Terry v. United States, (C.C.A. 8) 131 Fed. (2d) 40.....	84, 87
Tinsley v. United States, (C.C.A. 8) 4 Fed. (2d) 891.....	87
Thomas v. United States, (C.C.A. 10) 57 Fed. (2d) 1039.....	84, 87
United States v. Cohn, 270 U.S. 339, 345, 70 L.ed. 616, 619	70
United States v. Fox, 95 U.S. 670, 24 L.ed. 538.....	84
United States v. Louisville, etc., Co., 165 Fed. 936.....	65
United States v. Mitchell, 322 U.S. 65, 88 L.ed. 1140.....	99, 103, 105
United States v. Searcey, 26 Fed. 435.....	111
United States v. Watson, 17 Fed. 145.....	67, 68
Wynkoop v. United States, 22 Fed. (2d) 799.....	97
Young v. United States, 48 Fed. (2d) 26.....	84
Zito v. United States, 64 Fed. (2d) 772.....	84

STATUTES

Criminal Code, Section 35.....	64
--------------------------------	----

TEXTS

Ann. Cas. 1914B 661.....	67
27 Am. Jur. 647.....	66
22 C.J.S., Section 87, p. 155.....	79
26 C.J.S. 155.....	108
70 Corpus Juris, 689.....	89
18 U.S.C.A., Section 80.....	1, 2, 7, 63, 64
18 U.S.C.A. 550.....	79
28 U.S.C.A. Section 41, Subdivision 2.....	3
28 U.S.C.A., Section 225.....	3

United States
Circuit Court of Appeals
For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief for Appellants
Fernand Chevillard and George Patron

The Grand Jurors for the Southern Division of the United States District Court for the Northern District of California returned at the November, 1944, Term, an indictment in three counts against these appellants and five other persons. The first and second counts purport to be based on Section 80 of Title 18 U.S.C.A., while the third alleges that the defendants conspired together and with divers persons unknown "to defraud the United States in

violation of Title 18 U.S.C.A., Section 80,"* and pleads certain overt acts alleged to have been done in furtherance of the conspiracy. Acquitted on the first, but convicted on the second and third counts, each of these appellants was sentenced to be imprisoned for two years in a federal penitentiary on each count, the sentences in each case to run consecutively. (T. R., pages 33-36.) From the said judgments, Chevillard and Patron have each duly appealed to this court, presenting their appeals, pursuant to stipulation with the government, on a single transcript. The record of the trial in the court below is contained in a duly settled bill of exceptions.

*The statute reads as follows: "**Presenting false claims; aiding in obtaining payment thereof.**—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

JURISDICTIONAL STATEMENT

(1) Jurisdiction of the District Court.

U.S.C.A., Title 28, Section 41, Subdivision 2, which provides that the District Courts shall have original jurisdiction of "all crimes and offenses cognizable under the laws of the United States." Also, the Constitution of the United States, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

(2) The Jurisdiction of this Court upon Appeal to Review the Judgment in Question.

U.S.C.A., Title 28, Section 225:

"The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions,—

"First, in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title."

(3) The pleadings necessary to show the existence of jurisdiction:

(a) The Indictment. (Tr. p. 2.)

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:

These facts are set forth in the introductory sentences to this Brief and will be stated more fully in the ensuing abstract of the case. Accordingly, in the interest of brevity and to avoid repetition, statement thereof is here omitted.

**STATEMENT OF THE CASE, PRESENTING SUCCINCTLY THE
QUESTIONS INVOLVED AND THE MANNER IN WHICH
THEY ARE RAISED**

The indictment (Tr. pp. 2-8), omitting the caption and the signatures of counsel, reads as follows:

"FIRST COUNT

"(Title 18 U.S.C.A. Section 80):

"In the November, 1944, Term of said Division of said District Court, the Grand Jurors upon their oaths present:

"That Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. DeAngury, and Angelo Italo Vincenzini, whose full and true names, and the full and true name of each of whom, except as herein mentioned, are otherwise unknown to this grand jury (hereinafter called said defendants), on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, relating to a material fact, to-wit, the receipt of certain meat ordered by and for the use of the said War Shipping Administration, which said statement and representation was false and fraudulent as follows:

"That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had issued its orders to the Ed

Heuck Company of San Francisco, California, (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for certain meat to be delivered to the said War Shipping Administration, falsely stated and represented to the said War Shipping Administration that approximately 64,793 pounds of meat had been delivered by the said Ed Heuck Company to the said War Shipping Administration and had been received by the said War Shipping Administration, when in truth and in fact, as the said defendants and each of them then and there well knew, only approximately 46,961 pounds of meat had been delivered by the said Ed Heuck Company for the use of the said War Shipping Administration.

“SECOND COUNT

“(Title 18 U.S.C.A. Section 80):

“And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously cover up and conceal by a trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, the material facts so covered up and concealed by a trick, scheme and device being as follows:

“That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had ordered from the Ed Heuck Company of San Francisco (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereafter referred to as the Ed Heuck Company) approximately 64,793 pounds of meat, to be delivered by the said Ed Heuck Company to the said War Shipping Administration, diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use, and with intent to defraud the said War Shipping Administration covered up and concealed said material fact of said diversion and conversion by the said defendants of said approximate amount of 17,832 pounds of meat by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

“THIRD COUNT

“(Title 18 U.S.C.A. Section 88):

“And the said Grand Jurors upon their oaths do further present that the said defendants, Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did, in violation of Title 18 U.S.C.A. Section 88, unlaw-

fully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers persons whose names are to the Grand Jurors unknown, to commit offenses against the United States to wit, to defraud the United States in violation of Title 18 U.S.C.A. Section 80 in the manner following, to-wit:

“That the said defendants at all times herein mentioned, knowing that the War Shipping Administration, a department and agency of the United States, had placed a purchase order with the Ed Heuck Company of San Francisco, California, (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for approximately 64,793 pounds of meat for delivery to the said War Shipping Administration and for its use, conspired, confederated, and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat would actually be delivered to the said War Shipping Administration by the said Ed Heuck Company; and by the said defendants making and causing to be made false statements and representations in a matter within the jurisdiction of the said War Shipping Administration, to wit, that approximately 64,793 pounds of meat had been received by the said War Shipping Administration from the said Ed Heuck Company, when in truth and in fact, as the said defendants and

each of them then and there well knew, approximately only 46,961 pounds of meat had actually been delivered to and received by the said War Shipping Administration; and by the said defendants covering up and concealing by trick, scheme, and device a material fact relating to a matter within the jurisdiction of said War Shipping Administration, to wit, said material fact being that the said defendants had diverted to their own use and personal gain approximately 17,832 pounds of meat from a shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of said War Shipping Administration from the said Ed Heuck Company, and covered up and concealed said material fact by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

“That during the existence of said conspiracy and in furtherance of the same, and to effect the objects thereof, in said Division and District and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to wit:

“1. That on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Julio Rodriguez and Pierre Francois Barral met and held a conversation with one Elroy Hinman;

“2. That on or about the 18th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Pierre Francois Barral, George Patron, Fernand Chevillard, and Lucien L. De Angury met and held a conversation;

"3. That on or about the 22nd day of January, 1945, the said defendant Fernand Chevillard telephoned from the City and County of San Francisco, State of California, to the said defendant Angelo Italo Vincenzini at the City of South San Francisco, State of California;

"4. That on or about the 23rd day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Lucien L. De Angury and Pierre Francois Barral drove a truck loaded with approximately 17,832 pounds of meat from the City and County of San Francisco, State of California, to the City of Millbrae, County of San Mateo, State of California;

"5. That on or about the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, the said defendant Julio Rodriguez signed a receipt from the Ed Heuck Company for 64,793 pounds of meat;

"6. That on or about the 23rd day of January, 1945, in the City of Millbrae, County of San Mateo, State of California, the said defendants Pierre Francois Barral, Fernand Chavillard, George Patron, Clarence Valentine Jacky, and Lucien L. De Angury unloaded from a truck approximately 17,832 pounds of meat and placed the same in cold storage on the premises of the defendant Clarence Valentine Jacky."

The appellants Chevillard and Patron filed a general demurrer to each count of the indictment. (Tr. 12.)

This demurrer was overruled by the District Court on February 10, 1945, and each of the appellants excepted to the ruling. (Tr. p. 76.)

The defendants Chevillard, Patron, Rodriguez, Jacky and Vincenzini each pleaded Not Guilty to each and every count of the indictment.

The defendants Barral and De Angury pleaded Guilty to all counts of the indictment, and thereafter testified as witnesses for the government.

For a clear understanding of the case and for the purpose of showing the manner in which the questions involved on this appeal were raised, we deem it appropriate to set forth a résumé of the evidence.

The defendant Julio Rodriguez was chief steward, and the defendant Pierre Barral was assistant steward, on the S. S. "Sea Perch," which was operated by the United Fruit Company as a troop transport for the War Shipping Administration. All invoices and purchase orders were rendered to the United States of America War Shipping Administration. (Tr. p. 85.)

The Ed Heuck Company was a partnership engaged in the business of selling meat at wholesale.

Elroy Hinman, who was manager of the meat company, testified that an order for meat was received from the War Shipping Administration for the **Sea Perch** in January of 1945. (Tr. 89.) The witness related that on January 16, 1945, he received a visit at his office from Rodriguez and Barral, and had a conversation with them, which the court, over the objection and exception of counsel for the appellants Chevillard and Patron, permitted him to narrate. The point of the objection was, of course, that the conversation was had out of the presence of both Chevillard and Patron, and was not binding upon them. (Exception No. 4; Tr., p. 90.) The witness then proceeded to tell the following story of his dealings with Rodriguez and Barral:

"The chief steward stated that he had or his company had placed with our company an order for some

36 or 38,000 pounds of beef, that they did not require that much beef on the ship, that there already was more than was reflected by their inventory and that up to 25,000 pounds of that beef might be diverted to some other use, that he was willing to furnish my company,—that he was willing to see that my company received receipts for the delivery of the entire order, but that up to 25,000 pounds of that order should not actually be delivered to the ship, that we were to bill the entire quantity as ordered and dispose of a portion not delivered for our mutual profit. Nothing was said as to what our mutual profit was to be, only that it was to be divided three ways between the chief steward and the assistant steward and myself. I stated that all our deliveries to the ships were for the account of the War Shipping Administration, United States Government, that it would not be practicable to attempt to divert meat consigned to the Government to any other source. The chief steward and assistant steward both assured me that it would be a very simple operation, that our bills would be receipted for as a complete delivery. I stated that we would have no means of disposing of this meat anywhere else because everything we sold was to the Government. The assistant steward explained that he had arrangements or connections whereby he could himself dispose of the meat that was not delivered to the ship. I told him that I would like to think about that a little bit and meet them at some future date. I wanted to talk to my principals about it. When I say 'the chief steward' I mean Mr. Rodriguez. Both of those men then left my office and stated that one or both of them would contact me again.

“Following another telephone call on Wednesday, January 17, 1945, I met the assistant steward at noon at Tadich Grill on Clay Street, right across from our

place of business. He told me that the ship for which this meat was ordered was the Sea Perch, that it would be loading sometime the following week and that he would like to get from me a list of everything that we were to load on that ship. I told him that I would get that for him and deliver it to him when we met another time.

“Following another telephone call on Friday, January 19, 1945, I met the assistant steward at the corner of Montgomery and Sacramento Street. We walked to the Palace Hotel. I gave him a list of the complete meat order for our ship that was placed with our company, sat down in the lobby of the Palace Hotel after picking up some memo paper from the American Trust Company Branch Office there, made a list, and went over the list with the assistant steward. The list prepared at the time showed a certain quantity of beef, W.S.A., meaning War Shipping Administration specification. It did not show what the cuts are or any breakdown of it. The assistant steward told me that only the choice cuts of meat were to be withheld from delivery to the ship and should be loaded in a separate truck. He wanted to know the quantities of each different cut of meat that would make up this order. I went into the telephone booth with the assistant steward, called our office, obtained the percentages of the various cuts of beef according to the War Shipping Administration's specifications and the assistant steward wrote those percentages down on a slip of paper in the booth as I called them off for him from my end of the telephone. (Tr. 91-93.) At the Palace Hotel, after obtaining the percentages of the various cuts, the assistant steward and I sat down and made up a list according to his description of what would make a truck load somewhere under 25,000 pounds. About 19 or 20,000 would

be the limit of any of our trucks. We listed all of the choice cuts of beef according to the list I just identified and some pork items and some veal and lamb. I was directed by the assistant steward that that should be the meat that should be put onto a separate truck that should be withheld from delivery to the ship and the assistant steward explained that day as to how this truck might be delivered. He told me that the truck might go to the dock, the same as our other loads, would be loaded on the ship if there was anything to arouse suspicion, otherwise would be driven away by some truck driver to be furnished by him. He asked if we had a truck driver who might be taken into our confidence for not too large a fee to drive the truck and I told him that we probably could. He suggested that he contact a truck driver employed by our company that I might designate. I told him to call our place of business the next morning at nine o'clock and ask for Frank and I would arrange with Frank that he was to answer that call and would join the assistant steward and the assistant steward would explain to this truck driver direct what he was to do with the truck.

“At nine o'clock on the morning of Saturday, January 20, 1945, a telephone call came. I had instructed our telephone operator that when someone asked for Frank at nine o'clock to place that call on my phone. I asked the assistant steward to meet me at the same place—Montgomery and Sacramento Street—that I wanted to talk with him about the truck driver. I met the assistant steward at eleven o'clock and told him I thought it would be better for us to place this loaded truck on Sansome Street, right adjacent to our plant and just let it sit there and have his own driver come and pick it up. We walked to the place where I showed him the truck would be. On the way I told

him that this was an impossible deal, that it just couldn't be worked. I told him that there no doubt were a dozen people, probably FBI people, following us, that I would show him where the truck would be, but I recommended to him that he leave the truck alone. He assured me everything was all right, that he had all of his plans for the disposing of the meat.

"On Monday, January 22, I had a call from the assistant steward asking me to meet him at Tadich Grill as he wanted to make arrangement about the delivery receipts for the entire order of meat. At noon I met him and I told him that he had better forget the whole deal, that it wouldn't work, but that if he wanted to go ahead the bills were on the seat of the truck, the delivery receipts for the entire order of meat.

"On Tuesday, January 23, 1945, I received another telephone call from the assistant steward, asking me if the truck was sitting out there on Sansome Street. I told him it was. He asked if the delivery receipts were on the seat of the truck and I told him they were. On this truck which was on the corner of Sansome and Merchant Streets there were approximately 17,000 pounds of pork and lamb from the order for the Sea Perch. At 3:40 p.m. on Tuesday, January 23, the assistant steward came in my office, handed me the signed delivery receipt for the entire lot of meat order for the Sea Perch, including that, that was on the truck at that time sitting out on Sansome Street. I saw it there still. The paper you show me is the one handed to me by the assistant steward. There were several copies of it. I put a notation on there showing I received it at 3:40 p.m., January 23, 1945. It is the delivery tag from which we prepare our billing against the War Shipping Administration for delivery to their agents the United Fruit Company for collec-

tion of our charges. It covers all the beef items and all of the other items of meat ordered from us for the Sea Perch except some pork shoulders that were on a separate order and separate delivery receipt. That receipt includes approximately 17,000 pounds still on the truck as testified to by me. The total amount of meat this sheet calls for is approximately 64,793 pounds. I don't know the exact weight." (Tr. 94-96.)

On cross-examination by counsel for these appellants, the witness stated that he did not know whether a bill was sent to the United Fruit Company for the meat, and would have to depend upon his records, and that he did not know whether the Heuck Company delivered to the **Sea Perch** or to the United Fruit Company or the War Shipping Administration an amount of meat equivalent to that which had been left in the truck on Sansome Street. As to those matters he stated that he would have to depend upon the records (Tr. 101), and on the books of the company which were kept under his general supervision. (Tr. 103.)

At this juncture, counsel for Chevillard and Patron requested the court to instruct the witness to produce the books referred to. This request was opposed by the United States Attorney and denied by the Court, counsel for these appellants excepting to the ruling. (Tr. 103-104.)

Dean Heuck, who was a limited partner in the Ed Heuck Company, testified:

"During the month of January, 1945, I supervised an order of meat for delivery to the Steamship Sea Perch. Five trucks were required to handle the entire order, four large ones and one small one. The

small one was loaded at 530 Clay, the four large ones down at Battery, at National Ice. Three large trucks and one small one actually delivered meat to the Steamship Sea Perch. The fourth truck was placed out on Sansome Street, between Merchant and Washington. I recognize Government's Exhibit No. 5 in evidence. It is the receiving bill supposed to be delivered to the Sea Perch. It represents the entire order of meat for the Sea Perch—about 64,000 pounds. As far as I know there was only four trucks of meat delivered to the Sea Perch. The truck not delivered had on it around 17,500 pounds, which is included in this shipping tag and was not delivered. (Tr. 104-105.) . . . I was told to separate these special or certain cuts and load it on this one truck. I did so with the exception of the pork loins and the veal. I am referring to the large International truck that was left on Sansome and Merchant Streets. I recognize those boxes in the courtroom. That is the trimmed tenderloin. It was part of the shipment placed on the truck parked on Sansome Street.

"I was in company with the special agents of the FBI down at the Millbrae Dairy when certain meat was recovered by the FBI. The meat recovered there was the meat that had been placed on this special truck that had been parked at the corner of Sansome and Merchant Streets. These three items—the box, the sack, and the carton of meat—were part of the meat that was recovered in my presence by the agents of the FBI at the Millbrae Dairy on January 23, 1945. The large box contains fabricated lamb. The sack contains oven prepared rib, and the carton contained trimmed tenderloin. These three items are typical of everything that was in that truck." (Tr. 105.)

Cross-examined by Mr. Friedman, the witness testified:

"I supervised the loading of the fifth truck that never reached the Sea Perch. I did so in a manner to conform with the information that Mr. Hinman gave me as to what should go in that truck. I can identify them by the lot numbers of meat scheduled for that ship. I examined the lot numbers when they were taken out at Millbrae. When Mr. Hinman told me of these special things that were going to this special truck I was told why they were to be segregated from the other portions of the shipment. When I put these things in the special truck I knew that the contents of that truck were never to be delivered to the Sea Perch and I knew that the other four trucks were to be delivered to the Sea Perch. The 17,000 pounds of meat on the special truck was never delivered to the Sea Perch and another 17,000 pounds was never delivered to the Sea Perch to take its place." (Tr. 106.)

The court sustained objections of the United States Attorney to the questions, "Who did you bill for this meat?" and "Was your company ever paid for the meat?" An exception was noted on behalf of all of the defendants. (Tr. 106, 107.)

Melior Brandt-Neilson, who was employed to check ship stores for the United Fruit Company, was checking supplies for the **Sea Perch** at the Army base in Oakland on January 23, 1945, and during the course of the day received three or four truckloads of meat from the Ed Heuck Company. He testified that he had signed a receipt for the same which was presented to him by the defendant Barral. On cross examination the witness admitted that he did not check the stores against the receipts. He fur-

ther related that on the previous day he had a conversation with the defendant Rodriguez on board the **Sea Perch** in the course of which the latter stated that he had saved about 10,000 pounds of beef. He quotes Rodriguez as saying that he had gone to the Heuck Company to talk to the sales manager, stating that if all the meat in the order was supplied, he, Rodriguez, did not know what to do with it, and that the salesman had answered that he could return some meat and that they would be glad to pay him for it. This testimony was admitted in accordance with a ruling by the Court, made upon a prior objection, that conversations, transactions and events which may have occurred between any witness and any one defendant were being admitted as if the other defendant had objected to their materiality and binding effect on them, as if they had noted an exception to it, and subject to a motion to strike without the necessity of making the objections. (Tr. 90.)

The witness on cross examination further testified that he signed the papers presented to him by Barral without checking the meat, explaining this omission in the following language:

“If I had time to check, I checked before I signed, and if we don’t have time to check we sign the delivery tags anyway and check it later. I could not have kept that cargo on the dock until I checked it. I have nothing to do with loading the stores. As a checker, I have no authority to keep cargo on the dock. I can’t stop it from being put on the ship. The Army is against keeping the stores on the dock. It wants it all loaded on the ship as fast as possible.” (Tr. 112.)

He further stated:

“There was nothing wrong about the conversation I had with Rodriguez.” (Tr. 112.) “He said that the big item aboard these ships that the vessels took was the waste. I know that there was a lot of waste. Rodriguez said that on this last trip that the *Sea Perch* had just come back from, that he had saved 10,000 pounds of beef. Rodriguez said that the man at Heuck Company had told him, ‘If you could return any of the meat, we would be glad to pay you for it.’ ”

Henry Hamburg, chief checker for the United Fruit Company, testified that the *Sea Perch*, a troop transport, was berthed at the Oakland Naval Supply Depot, Pier 4, on January 23, 1945. The witness said that he had received from the witness Brandt-Neilson five copies of receipted delivery tags from the Ed Heuck Company, which he took aboard. He further testified that one of the tags, marked United States Exhibit No. 9, was signed by Rodriguez, and by himself, and taken to the accounting department of the United Fruit Company.

On cross examination, the witness stated that he satisfied himself that the tag represented the stores that had been delivered on the word of the witness Brandt-Neilson. He did not ask Rodriguez if he had checked the stores to see whether the tags correctly represented the goods received. (Tr. 116.) “Ordinarily,” said Hamburg, “when these tags are presented to the chief steward to sign, as a matter of fact the chief steward does not know whether the stores are there or not. He takes my word for it.” (Tr. 116.)

Harold Buggeln, chief clerk in charge of accounting for the United Fruit Company, testified that the shipping tag

from the Heuck Company, referred to by the previous witness, probably was delivered to him on January 24. "Upon receipt of the tag it is held for the War Shipping Administration. The tag is used in the preparation of payment for the materials and supplies which the war tag calls for." (Tr. 117.)

Cross-examined by Mr. Friedman, the witness Buggeln testified:

"The tag is used in support of the invoice. It indicates the receipt of material. Before an invoice can be paid you have to be certain that the material has been delivered, and the only way you have of being certain is from this tag. When I get the invoice I check it against the tag."

Asked by counsel, "Did you check this tag against the invoice?", the witness was not permitted to answer, the court sustaining an objection to the question by the United States Attorney and noting an exception in favor of all the defendants.

Further cross-examined, the witness stated:

"The United Fruit Company pays my wages and has done so ever since I worked for them. I am not an employee of the War Shipping Administration. This paper was eventually sent to the New York office. It was accompanied by an invoice from the Ed Heuck Company. When I say this paper, I mean one of the duplicates, and an invoice was sent along with it. A copy of that invoice was kept here and is still in my custody. This tag and an accompanying invoice was sent to the New York office for payment. When I sent the duplicate of United States Exhibit No. 9 (the tag previously referred to) on to New York for the payment of the invoice, it called for

payment commensurate with the amount of meat mentioned in this tag. I received from the Ed Heuck Company an invoice calling for payment to them of the 64,000 odd pounds of meat. I do not know whether it was paid. (Tr. 119.)

On re-cross examination by counsel, the witness stated that when he received the shipping tag calling for 64,793 pounds of meat, he knew that some of it had not been delivered but that he did not make any change in the invoice, sending instead a letter of explanation stating that certain of the meat had been recovered, but, as the United Fruit Company had receipted for the full amount, they felt obliged to pay for it.

Neither Hamburg nor the witness Brandt-Neilson was an employee of the United States or of the War Shipping Administration. (Tr. 120.)

Bills for all supplies for the ships operated by the United Fruit Company for the War Shipping Administration were paid by the New York office of the company from a joint account established in accordance with a general agency agreement. (Tr. 120.)

All of the foregoing testimony was deemed objected and excepted to by the appellants Chevillard and Patron, pursuant to the order of the court heretofore referred to.

Pierre Francois Barral, one of the defendants named in the indictment, who, as previously stated, had pleaded Guilty, was called as a witness by the Government. He stated that in September 1944 he had a conversation with Patron and Chevillard at the Normandy Restaurant, which was operated by them. They asked him if he could not get some meat for them, but did not request him to get meat

from the **Sea Perch**, on which the witness was employed as second steward. After that the witness went to sea, returning on December 28, 1944. About two days before the end of the voyage, the witness testified, Rodriguez said he had aboard the ship about 20,000 pounds of meat that nobody knew about, and asked him if there was any way the meat could be sold; and when the witness stated that he did not know, Rodriguez asked, "How about your friend in San Francisco who speaks French?" On the second or third day after the **Sea Perch** arrived at San Francisco, Rodriguez took a trip to New York, returning January 13, 1945. After testifying relative to the conversations which he and Rodriguez had with Hinman, manager of the Heuck Company, concerning which that witness theretofore had testified, Barral stated that on January 13, 1945, he and Rodriguez talked to Patron and Chevillard, apparently at their place of business, and "I told Patron that I might get some meat for them and he said that they were ready to take the meat any time. Then I talked to Chevillard the same as to Patron. Chevillard said he was ready to take the meat any time we were ready." (Tr. 127.) At that time the Ed Heuck Company did not have any order for meat for the **Sea Perch**. (Tr. 128.)

Concerning his further dealings with Hinman, Patron, and Chevillard, the witness testified:

"I met Mr. Hinman at a lunch place near the meat plant the date following January 16. Hinman said it was time to make arrangement to get the meat, but we did not know how to do it that first day. Mr. Hinman said he would take care of that. After lunch I went back to the ship and told Rodriguez of the conversation

I had with Hinman. Rodriguez said we will see how it is going to work. That night I went to see Patron and Chevillard in the Normandy Restaurant. I said, 'Maybe we had to get the meat. I just saw the manager during the day.' Chevillard and Patron said they were ready to take the meat any time it would be fixed. Mr. Chevillard said the price of the meat would be forty-five or thirty cents a pound—they would pay according to what the meat was. I understand they wouldn't pay forty cents a pound for chuck.

"On the 17th or 18th of January I saw Mr. Hinman. We went I think to the Palace Hotel. Hinman had the order from the company and he showed me the order. I selected some items and told him what meat I wanted from that order. Government's Exhibit 4 was given to me by Mr. Hinman at the Palace Hotel. I wrote on the right hand side of that paper. Mr. Hinman called up the company from a telephone booth and asked them how much meat he was supposed to get and I was marking the order when Mr. Hinman was talking over the phone. I marked down all the better cuts of beef. I had no other talk with Hinman that day. I went back to the ship and told Rodriguez about the talk I had had with Mr. Hinman. Rodriguez did not say anything except that he was satisfied with the deal and how it was working out.

"The next day Hinman was supposed to get in touch with the truck driver for the meat company. I did not see him but I talked with him over the phone. He did not get a truck driver. I talked to him about a truck driver at the lunch place. Hinman told me he would let me know the next day after he talked to the truck driver. The next day he called me and said he couldn't trust the man. He couldn't take a chance with that man. I had to look for a truck

driver myself. Mr. Hinman gave me his home telephone number and I gave it to Rodriguez. After the talk about the truck driver I went to see Patron and Chevillard and told them if they knew somebody who could drive the truck. They said they would look for somebody, but they didn't find nobody. Up to this time I did not say anything to Patron or Chevillard about how much meat I was going to have except from fifteen to twenty thousand pounds.

"I told Chevillard and Patron how I was going to get the meat and about the delivery tags in the Normandy Restaurant on the 18th or 19th of January. I told them that we would get the meat, **'not from the ship but from the meat company,** that we have the meat on the ship, 20 or 25,000 pounds of meat and that we got a truck that would go to their place.' **I told them the meat would be coming from the meat company.** I said the meat was a truck load, instead to go on board the ship it would go to their place, that meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says, 'The bill will be signed by the ship's steward or the checker.' They said to let them know when we would be ready to deliver the meat. On January 22 I saw Mr. Hinman in the street. He told me that truck would be loaded and be in a certain place waiting for us and that the bill will be right on the seat of the truck. That is all that was said. It was about eleven or ten o'clock in the morning.

"On January 23 I went on board the ship, about nine o'clock in the morning, and there was already some truck already on the pier unloading meat and the checker was there and Mr. Rodriguez was there checking the meat, and there was an Army Lieutenant or soldier checking the meat too. All the trucks were there except that truck was in the street. Rodriguez

and I were waiting for that Army man to get off the pier. Then we can find the bill. Rodriguez and I talked, said that we couldn't do nothing as long as the man was there on the pier. Rodriguez said that. At 11:30 Rodriguez told me to go on the truck and get the bill to be signed. The truck was in San Francisco and the bill was on the seat of the truck. I came over to San Francisco and got the receipt off the truck and went back to Oakland where I gave the bill to the checker, Brandt-Neilsen, who signed the delivery tag. Government's Exhibit No. 5 is the bill from the meat company that I gave to Brandt-Neilson and which we signed. Rodriguez said that the checker will sign the bill or him. If the checker was not there he would sign the bill himself. Rodriguez said that he or the checker would sign the bill but that was already fixed. He didn't mention whether it was fixed with the checker or not. Then I came back to town and went to the office and gave Mr. Hinman the tag, Government's Exhibit No. 5. After I left Mr. Hinman I went up on Broadway looking for a truck driver and found Lucien De Angury. After that I went back to the Normandy and saw George Patron and told him I had a truck driver with me. Patron said, 'Let us go to the place and get the truck and load it.' From the Normandy Restaurant we went to the truck driver's place and the truck driver changed his clothes. Then Patron took us to where the truck was near the meat plant. Patron took us to the truck driver's home and from the truck driver's home to where the truck was. At that time I knew we were going with the truck to Millbrae. I had a diagram or map as how to get to Millbrae. I had one from Chevillard. I recognize the envelope you show me. Chevillard gave that to me on the 22nd. It is a map to go to Millbrae from San Francisco.

"I received a second map showing the route to Millbrae from George Patron. He gave it to me in the garage place on the road where we were repairing the light for the truck. When we got to the truck we couldn't start it, the battery was dead. We finally got the truck started and started for Millbrae. Lucien De Angury was driving the truck and I was sitting with him. About half way between San Francisco and Millbrae we made the first stop. Patron was ahead of us in a car. He came back when he found out we were stuck. The paper you show me is a map from where we were to go to Millbrae. It was given to me by George Patron.

"We had battery trouble on the trip and got a new battery from a garage. George Patron, De Angury and myself were there at the time. After we had the battery fixed we proceeded on to Millbrae. Patron was leading the way. At the Millbrae Dairy we back up the truck to unload the meat. When the truck arrived at the Millbrae Dairy there were present Chevillard and Patron and Mr. Jacky. I had never seen Jacky before. There was also De Angury, George Patron, Chevillard, the truck driver and myself, all unloaded the meat. Jacky only checked the meat. That was about 9 or 10 o'clock at night." (Tr., pp. 129-134.)

On cross-examination by Mr. Friedman, the informer stated that he was born in France, was not a citizen of the United States and had pleaded Guilty. He was asked by counsel, "What was it you pleaded guilty to?" The United States Attorney objected to this question upon the sole ground that "The indictment speaks for itself."

"Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

"Mr. Hammack: It is not a question of what he thought; he pleaded guilty.

"The Court: I sustain the objection. I think that is a legal question.

"Mr. Friedman: Exception, Your Honor.

"The Court: Exception noted." (Tr. 134.)

After being thoroughly cross-examined as to the failure to check the shipment of meat at the dock before it was loaded on the **Sea Perch**, and his conversations with Rodriguez and Hinman, the witness testified as follows with reference to his alleged dealings with Chevillard and Patron:

"On December 28 was when I talked to Chevillard or Patron about meat. I saw them both. Chevillard runs the dining room and Patron takes care of the bar. I first talked to Patron behind the bar. I told them we would get some meat for him if he pleased. Patron said, 'You better talk to Chevillard, because he is the one that runs the food business.' Then I saw Chevillard in the dining room. I told him about the meat and we might get some meat, that we didn't know how it would work. There was nothing sure about it, but he said he was willing to take meat at any time. I told him from fifteen to eighteen thousand pounds of meat. The price was not really fixed. It was according to what he would give. According to the quality of the meat. I don't know who said about thirty-five or forty cents a pound. I don't know if I mentioned that or he mentioned it. Chevillard, Patron and I talked about the meat almost every day. One day after talking to Hinman I saw Chevillard and Patron and told them, 'We will get the meat for you.' That was on Saturday, the 13th, the day Rodriguez came back from the East. I told Patron

the chief steward was back from the trip and as soon as we found out how we could get the meat I would let him know. I told Chevillard the same thing. On the night of the day we first saw Mr. Hinman I saw Chevillard and Patron and told them we saw the manager during the day and were talking about how to get the meat. I told whichever one I spoke to that I thought I would be able to get some meat. That is all that was said. On Wednesday in the evening, about nine or ten o'clock, I spoke to Patron first at the Normandy and told him that we were talking to the manager of the meat company and I told him we had 30,000 pounds of meat they had left on board the ship and that nobody knew about it and that **we could get one truck load from the meat company and send that meat to them.** I told Chevillard the same thing. The talk lasted about ten or fifteen minutes with each. There were people in the place. Chevillard was busy running the dining room and Patron was busy behind the bar. On Thursday, between seven and ten o'clock at night I asked Patron if he knows a party who could drive a truck. It was the day Hinman told me he could not get the truck driver from the company. I spoke to Patron about the truck driver and not to Chevillard. Patron told me they had somebody on hand. He said he might have somebody to drive the truck.' Patron told me he couldn't get a truck driver so I had to look for a driver myself. I didn't look until Tuesday, the 23rd, after the bill had been signed by Brandt-Neilson. I found a truck driver in the Hotel Espagnol; in the bar. I knew Mr. De Angury before that. I had just seen him around. He is not a truck driver but I know he could drive a truck,—I supposed so. I did not go into the hotel looking for De Angury. I was looking

for somebody that I knew who could drive a truck. Up to this time I had not had any talk with De Angury. He was drinking at the bar and we left the bar together and went to the Normandy Restaurant. Patron was there. Chevillard was not there. I told Patron I had found a truck driver and that this was the man. When I found De Angury he was drunk. He was having too many drinks. He was pretty close to being drunk. After I found De Angury I was in the Normandy Restaurant about three or four minutes. Then we went to the truck driver's home where we were about five minutes and De Angury changed his clothes. Then Patron took us in his car to where the truck was, where we arrived about four or five in the afternoon. We arrived at the place where the truck was unloaded about eight or nine o'clock. It took us four hours to get to Millbrae as we got stuck with the old truck twice on the road. First the battery went out and we had to get a new battery. Then something went wrong with the light. We were stopped on the road by a policeman who gave us a tag for poor lights. It was a meat company truck and it had the name of the meat company on it. De Angury drove the truck for two or three miles but he didn't know how to drive the truck. The garage man who repaired the battery got in and taught him how to operate the truck. We were following Patron.

“I got the first map from Chevillard on January 22, in the evening. It was the one on the envelope. It was my envelope and Chevillard drew that plan on it. I had that envelope with me on the 23rd. When we were in the garage and they were fixing the light Patron drew a map. I didn't tell him I already had a map.

“When we arrived at the place where the meat was to be unloaded there was Chevillard, Patron, Jacky, the truck driver, and myself. Jacky said where to put the meat. Chevillard, Patron, De Angury and I actually unloaded the meat. I was in the truck handing it out to the people that were on the ground and they carried it away. It took an hour and a half or two hours to unload the truck. The place was lighted inside. There was not much light on the outside. After all the meat was unloaded Chevillard was figuring how many pounds there was there. Chevillard signed a bill with Mr. Jacky and he put my name on it. It was the bill that Mr. Jacky gave to him, the receipt for the meat and Chevillard signed my name. When I came up it was already signed. I said to Chevillard, ‘What are you signing my name for?’ and he said, ‘It don’t make no difference.’ I did not tell Chevillard to either sign or use my name.

“I never had any talk with Chevillard or Patron as to how they were going to pay me for the meat or when they were to pay me. The only time I ever talked with Chevillard or Patron about being paid for the meat was that they said that they would pay thirty-five or forty cents a pound, depending on the quality of the meat. I knew the price of the meat would be somewhere around four or five thousand dollars. I never had any talk with them when they were going to pay me the four or five thousand dollars or how they were going to pay me.” (Tr. 139-143.)

On recross examination, Barral testified that he did not know that there were three charges in the indictment. “I know that I am in court. That is all I know.”

“Q. (By Mr. Friedman): You pleaded guilty, but you don’t know how many charges you pleaded guilty to—is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross-examination, immaterial, irrelevant, and incompetent.

The Court: I will sustain the objection.

“Mr. Friedman: Might I call the Court's attention to this?”

The Court: I do not think it is necessary to argue this. You have made your objection and I have ruled on it.

Mr. Friedman: May we have our exception?

The Court: Yes.” (Tr. p. 151.)

George M. Kinelle, the chef at a resort known as “The Troc,” on Geary Boulevard in San Francisco, testified that on January 16, 1945, he had a conversation with Chevillard, who told him that he knew some people who had meat, and asked if he would purchase any of it. “He told me he had a party who had some meat to sell. As a result of that conversation I went up to the club [the Chef's Club] and talked to some other chefs and then came back on the 23d and left an order for 15,000 pounds of meat.” (Tr. p. 154.)

Joseph Mancini, who operated a service station in the 5100 block on Third Street in San Francisco, testified that on January 23, 1945, Patron drove into his place of business and procured a battery for an old truck.

Sarah Hughes, a former employee at the Normandy Restaurant, operated by Patron and Chevillard, testified that on the night of January 23, 1945, the witness Kinelle left a note with her for Chevillard. (Tr. p. 157.)

William J. Hurley, a special agent for the Federal Bureau of Investigation, swore that on January 23, 1945, he saw a truck with the Ed Heuck name on it parked in Key Street to the right of Third Street just before its junction with Bayshore Boulevard. At that time he did not get close enough to the truck to recognize the people in the vehicle. Later, while proceeding south on Third Street, he saw a dark green car which pulled out of Key Street and made a left turn into Third Street to the North. He recognized Patron as the driver. Later the witness followed Patron's car as far as Millbrae, and later the truck came along, followed by an F.B.I. car. He did not actually see the cars go into the Millbrae Dairy. (Tr., 162-164.)

Dallas Johnson, another government agent, testified that he made an inventory of certain meat, recovered from the Millbrae Dairy and, at the time of the trial, in storage in the Army warehouse in San Francisco. The total number of pounds shown by the inventory was 17,832; and the total number of pieces, 321.

Ronald A. Wilson, another special agent of the Federal Bureau of Investigation, testified that he and still another agent, one Fallaw, took a statement from the appellant Chevillard in the early morning hours of January 24, 1945. The following objections were made by Mr. Friedman to the introduction of this evidence:

“Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it? -

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be admissible on one count and not admissible on the other.

The Court: All right." (Tr. pp. 166-167.)

To point the argument, hereafter presented, that the learned trial judge committed error in admitting the statement (U.S. Exhibit 18), it will be necessary to set forth the document itself and the cross-examination of the agent by counsel for the appellant Chevillard. The statement, which was admitted over objection and exception, is as follows:

"I, Fernand Chevillard, hereby make the following voluntary statement to Special Agents Ronald A. Wilson and Lee M. Fallaw of the Federal Bureau of Investigation, first having been told by them that I have the right to have an attorney, that I do not have to make any statement and that any statement I do make may be used against me in court. No threats or promises have been made to me and no inducements have been offered me. I have known Pierre Barral for about six months. He would come to the Normandie Restaurant to see me and my partner, George Patron. I knew that Pierre Barral was a chef on ships. About two or three

months ago Barral offered to sell me some meat off his ship, but I did not buy any. For the past ten days Barral has been coming to the Normandie Restaurant from his ship. About Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship. Barral offered to sell me 15,000 lbs. of New York Cuts, Filets, rib and lamb at 40c per pound. He said he wanted to sell the whole 15,000 lbs. at the same time. I told him I was broke and couldn't buy the meat, but that I would inquire around to see if I could find anyone to buy the meat and I told Barral I would also try to find a place for the meat to be stored. Every day after that Barral asked me if I had found anyone to buy the meat or if I had found a place to store it. Barral told me that he would have the meat in a truck and we had nothing to worry about except to find a place to store the meat. George Patron was present when Barral made this statement. This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself. We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction. After having discussed the matter with Barral I made inquiries of several persons as to whether they would be interested in purchasing this meat. I also made inquiries regarding refrigerator space to store the meat. Angelo Vincenzini, a butcher who lives at 540 San Antonio Ave., Lomita Park, Calif., told me he

thought I could get storage space for the meat at Millbrae Dairy and then advised me there was storage space there which I could get. That night at the Normandie Restaurant I told Barral and Patron there was storage space available. Barral said the truck driver didn't want to come and I said 'the deal's off' because I realized the deal was wrong. Barral had told Patron and me that the meat belonged to the Merchant Marine. On Jan. 23, I was at 35 Lake St., when I got a phone call about 4:30 p.m. from Mrs. Patron, who said George Patron had told her to get in touch with me by any means possible and tell me to go to Millbrae. I then drove to Millbrae in my car and saw Mr. Jacky of the Chip Steak Co., who has the Millbrae Dairy. I told Mr. Jacky I had come for the storage space that Angelo Vincenzini had talked to him about. I then waited for the truck with the meat to arrive. I knew that George Patron would accompany the truck. Between 8:30 and 9:00 p.m., Patron came in his car to the refrigeration plant. Barral was in the truck with its driver, Lucian, whom I know by sight, when it drove up at the same time. Mr. Jacky was the only other person present. Patron, Barral and the truck driver unloaded the meat from the truck while I checked the weights of the meat with Mr. Jacky. I kept a record of the weights in my address book, notations indicating the total weight of the meat was 15,875 lbs. After the truck was unloaded Mr. Jacky asked me in whose name the receipt should be made and I told him Mr. Barral. The copy of the receipt was given to me instead of to Mr. Barral as Mr. Barral was absent changing his clothes at the time. However, the receipt would probably have been given me anyway, so I could get the meat for a purchaser if I had decided to go through with the deal, as Mr. Barral was leaving town in a short time. I paid Mr. Jacky \$30 of my own money on account for storage, which

was to be at one cent a pound per month, and we agreed to settle the balance the next day. I made these arrangements with Mr. Jacky. The receipt was turned over by me to Special Agents Wilson and Fallaw on Jan. 24, 1945. I also turned over to them my notebook showing notations I made checking the meat off the truck. After the truck was unloaded I told the others that I would see them later and drove back to San Francisco alone in my car. I have not discussed the meat with anyone since that time. I got back to the Normandie Restaurant about 11:00 p.m. The hostess, Mrs. Sarah Hughes, gave me a slip of paper on which was written 'Order for 15,000—about 75' and which bore the signature of George, the chef at the Troc, a night club on Geary Blvd. I had discussed the meat with George and told him I knew where he could get meat, and I took this note to mean he would buy 15,000 lbs. of meat at 75c a lb. The price indicates to me that he wanted filets or New York cuts. I had also talked to Angelo Vincenzini and told him he could probably get some of this meat at 40c or 50c per pound. He said he might be interested in buying some of the meat later. I told Angelo Vincenzini all about the meat and where it was coming from and how it was being obtained, and he said he wanted to stay out of jail. This was on Monday, Jan. 22, 1945. During the past five or six days I mentioned this meat to several other chefs, whose names I do not know, thinking they might want to buy some of the meat.

"I have read this statement on five pages and it is true.

"FERNAND CHEVILLARD.

"Ronald A. Wilson, Special Agent, FBI—1/24/45.

"Lee M. Fallaw, Special Agent, FBI, San Francisco, California." (Tr. pp. 168-172.)

Cross-examined by Mr. Friedman as to the circumstances in which the statement was taken, the agent testified:

“The paper signed by Mr. Chevillard was written by Special Agent Fallaw. I did not write any part of it. The statement was taken on the early morning of January 24, 1945, between the hours of 2:30 and five o'clock. Mr. Chevillard was taken into custody at about 1:10 at the Normandie Restaurant and was removed from there almost immediately to the San Francisco Field Office of the Federal Bureau of Investigation, where he was kept until 5:30 in the morning. The statement was signed probably about five o'clock in the morning. I did most of the questioning of Chevillard. I spoke to him in English and had no difficulty in understanding him and he had no difficulty in understanding me. The mechanics in taking the statement were that I questioned him and then we would decide on how he wanted to say each thing and that was put into the statement. I would question him and he would answer and sometime his answer was not in a form that would go down and we would have to straighten it out—I mean we would have to ask him some questions so as to get his statement, that is his answers were not responsive at all times. We did not have a stenographer there and nobody took down the questions and answers stenographically or with a machine nor was there anything to preserve a record of what was actually said or done. Sometimes his answer would be long and rambling and sometimes it was not responsive to the question and we would have to ask the same question several times before we got a responsive answer. On other times we thought his answers was immaterial to the question that had been asked. There probably were questions that were asked and do not appear and there were answers given that do not appear in the state-

ment. He gave several explanations when we were asking about things pertaining to Barral and to the meat. It took us from about 1:30 until five a.m. to acquire the information from Mr. Chevillard that appears in this document. It took approximately $3\frac{1}{2}$ hours. Mr. Chevillard did not tell us that he understood he had the right to have a lawyer. He was told that. He did not use the words that he was willing to make a free and voluntary statement. We asked him, we told him we would like to ask him some questions about this matter. He was asked if any threats or promises had been made against him or to him. We had not made any. You usually include that in the statement. I asked him if any threats or promises had been made to him and he said no, that was at the time the statement was being made. The statement was not being written during the whole $3\frac{1}{2}$ hours. It was not being put on paper. We started to write the statement when we thought that Mr. Chevillard was giving us the information that was true. He did give information that I did not think was true. It consisted mostly of denials on his part. He first denied that he had any dealings with Barral outside of the fact that he had gone out to get the refrigerator space for him. He made that denial just once. He denied that he was going to profit on the sale of this meat or from this transaction. He denied that he was going to receive any of the meat. He denied that there had been any agreement between himself and Barral. In fact he denied almost every question we put to him first. He made these denials for about an hour. That is, up to somewhere around half past two. He did not deny that he knew where the meat was supposed to come from or go to. During the first hour he said that he knew it was meat that was to go to Barral's ship, and that it was going to be put on a truck and that Barral was going to get a truckload of

meat. During the first hour Mr. Chevillard said that he did not have the money to purchase the meat. He did not say that he never agreed to purchase it or never intended to purchase it. We asked him whether or not he intended to buy the meat and his reply was that he did not have the money to buy the meat, that Barral wanted to sell all the meat at one time and he did not have the money to buy it. He told us he knew Barral about six months, that Barral had first come to the Normandie Restaurant about six months previous to the time we talked to him. He said that two or three months previous Barral had approached him about selling him some meat from his ship and that he told Barral he could not use any. (Tr. pp. 172-175.)

“To a certain extent the words used in this written statement are the words used by Mr. Chevillard. I thought he spoke English quite well. He does talk a little broken, yes. This statement really is edited. It was put in a form so that it will read. It purports to be the substance and not the words of what Mr. Chevillard told me—there are some exact words there and some different. When I first questioned Chevillard about Barral first offering to sell him some meat his reply was he could not use any. If it says in the statement ‘I did not buy any’ then he said he did not buy any. I asked him why he did not want to buy any of the meat and Chevillard said he couldn’t use any. I did not ask Mr. Chevillard if Barral had explained to him how he was going to get the meat off the ship to sell it. (Tr. pp. 175.)

Q. Let me call your attention to this particular language which appears on page 2 of the statement:

‘This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron, and myself.’

Q. Are those Mr. Chevillard’s words?

A. I believe he agreed to that statement, in that form.

Q. Isn't it a fact that you had quite an argument with him about the word 'agreement'?

A. There was some talk about it.

Q. Well, now, what was said about it?

A. He wanted—he said he did not like the word 'agreement,' and we asked him what he would call it, and he said it was a deal. He said he did not like the word 'agreement,' and we asked him if it was not true that they had agreed to do this, and he said yes. We said, 'Isn't it true that it would be an agreement?' And he said, 'Yes,' he understood it would. (Tr. pp. 175-6.)

There was some discussion about the word 'agreement' and it was finally agreed by Mr. Chevillard that it was an agreement. I would not say we argued with him. We asked him further questions to try and determine if this was not an agreement. At first Mr. Chevillard did not want the word 'agreement' used. Afterwards we agreed that it was an agreement. I asked him if he did not think that it was an agreement and he answered that he thought it was. (Tr. p. 176.)

Mr. Friedman: Q. I will call your attention to this portion of the statement: 'About Thursday or Friday, January 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 lbs. of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship.'

Did you ask Mr. Chevillard whether or not Barral's conversations were with Chevillard and Patron together, or separately? A. Yes.

Q. What reply did he make?

A. He said he talked to both of them. They were

both there at times, and sometimes Barral talked to Patron, and sometimes to Chevillard. (Tr. pp. 176-7.)

With reference to these statements relative to conversation with Barral I do not recall which conversations took place solely between Barral and Chevillard. When I took Chevillard in custody shortly after one o'clock on the morning of the 24th I told him what he was being arrested for. I told him he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company. I don't recall if I told him anything else relative to the nature of the charge against him. I did not tell him he was being arrested for helping to steal the meat or for helping or causing to be made false statements to the War Shipping Board. I did not tell him he had been arrested because he had made or used or caused to be made, or caused to be used a trick or scheme to conceal a material fact from the War Shipping Board or the War Shipping Administration. I believe we did tell him that the charge against him would be conspiracy to defraud the government. Chevillard did not ask and we did not tell him who he was supposed to have conspired with. (Tr. p. 177.)

During this 3½ hours, while I was questioning Mr. Chevillard, there were no notes taken. I questioned Chevillard as to what he was going to get out of this transaction and he said there had been no agreement as to what he was going to get. Later he said that he expected to profit from the transaction in some manner. I asked him how, and he said he didn't know for sure whether or not from the purchaser, but in some way he expected to gain from it. There was quite a lot of discussion about that matter, probably fifteen minutes.

Q. Well, taking your figure of fifteen minutes, it is all summed up, is it not, in these words in the state-

ment as follows: 'We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction.' Is that right?

A. That is the summation of what he told us.

Q. That is the summation of fifteen minutes' worth of conversation?

A. That is the summation of what I told you. I don't know how long the conversation lasted.

Q. Now, you have this statement here: 'Angelo Vincenzini, a butcher who lives at 540 San Antonia Avenue, Lomita Park, California.' He told you that he was a butcher that lived in Lomita Park?

A. I think we looked up the exact address and asked him if that was the fellow. I am quite sure that was the way it was.

Q. You looked it up where?

A. In the telephone directory.

Q. And you asked him if that was the address?

A. He had the slip of paper with the telephone number on it, and he said that was the fellow.

Q. So that he actually didn't tell you that Mr. Vincenzini lived at 540 San Antonio Avenue, Lomita Park, California, did he?

A. He said that was the Mr. Vincenzini that he had talked to.

Q. On the bottom of page 2 you have this statement: 'Barral said the truck driver didn't want to come.' Did you ask him what truck driver he was talking about?

A. No, I don't believe we did.

Q. You didn't ask if it was the truck driver of Heuck that didn't want to come?

A. No.

Q. You didn't ask if it was the truck driver that Barral had procured that didn't want to come?

A. No, sir. (Tr. pp. 177-9.)

On the top of page 3 of the statement it says, 'And I said, 'The deal's off' because I realized the deal was wrong.' Mr. Chevillard said that the deal was off and he was asked why he said that, he said that he did it because he was becoming worried about the matter and he was asked if he was worried because he knew the deal was wrong and he said 'Yes.' The reason I didn't put it in the statement is, it is not supposed to be a word for word question and answer statement, that is the substance of the conversation that took place. We discussed with Mr. Chevillard as to what should go in and what should be left out of the statement. We told him that it was his statement and that we wanted to get the facts as clear as we could in there, and before something was written down it was restated and asked if it was all right and that is the way he wished to say it. We did not discuss with Mr. Chevillard what should be left out of the statement, of the things he told me in those 3½ or 4 hours. Mr. Chevillard told me what is contained in the statement as 'Barral had told Patron and me that the meat belonged to the Merchant Marine.' I didn't tell Chevillard that he was wrong that the meat didn't belong to the Merchant Marine, but that it belonged to the War Shipping Administration.

Q. Isn't it a fact what you asked Mr. Chevillard was, 'Did you know where the meat was supposed to go?' And he told you Barral told him it was to go to the Merchant Marine?

A. No, sir, I don't think that was the way it was.

Q. You don't think—do you know?

A. Yes, sir.

Q. You have no notes?

A. I recall quite well that point, and that wasn't the way it was. (Tr. pp. 179-180.)

In reference to that portion of the statement which says that Mr. Chevillard received a phone call while at 35 Lake Street, in which Mrs. Patron told him to go to Millbrae. We had a discussion about that. Chevillard said there was nothing said as to why he should go to Millbrae, that he knew why he should go to Millbrae. I didn't put that in the statement. Chevillard did not say that he started to keep a check of the meat that was being stored at Millbrae and when he found out it had Government marks, a thing he never knew, that he stopped keeping the record. I do not recall of Chevillard saying that the reason he paid Mr. Jacky \$30 was because Barral said that he had no money with him and asked Chevillard to advance the \$30 for him to pay on the storage. The words in the statement, 'The receipt was turned over by me to Special Agents Wilson and Fallaw on January 24, 1945,' were not a statement made by Mr. Chevillard. It was put in the statement and he agreed to the statement after it was put in. He read the statement over and said it was true and signed it. After Chevillard signed the statement he was taken to the City Prison and booked. He was taken from the Special Field Office between 5:15 and 5:30, and brought to the City Prison around 5:30 or six o'clock in the morning. There was no further conversation. The statement was signed and I was satisfied." (Tr. pp. 180-1.)

Herbert W. Schroeder, supervising special agent for the Pacific Telephone Company, being called as witness for the Government, it was stipulated by counsel that the records of the Telephone Company showing listings of

the South City 'phone numbers 221 and 83 and San Bruno 87, were in the name of the Palace Meat Company, and that the Defendant Vincenzini had signed the cards placing the 'phone numbers; that Vincenzini was one of the owners of the Palace Meat Market; that the phone number Millbrae 727 is listed under the Chip Steak Company, of which the defendant Jacky was the manager; that Exbrook 9664 was the listing of the Normandie French Restaurant and that the listing was signed by Fernand Chevillard. (Tr. p. 182.)

Leslie W. Roberts, called by the Government, testified:

"I am an auditor with the United States Maritime Commission which audits for the War Shipping Administration. Ships operated by the War Shipping Administration, through general agencies, all of the accounts, expense accounts, invoices and all extras, pertaining to the operation of such ships are audited by the War Shipping Administration."

The United States Attorney then offered in evidence against all the defendants the following exhibits which had been theretofore admitted against the defendant Rodriguez alone:

Exhibit 1, which is a contract between the War Shipping Administration and the United Fruit Company;

Exhibit 2, Steward's account of stores;

Exhibit 3, The order for meat from the War Shipping Administration to the Ed Heuck Company;

Exhibit 4, Memoranda showing percentage of meat cuts;

Exhibit 5, delivery tags signed by Brandt-Neilson;

Exhibit 6, memoranda by Hinman of load on truck;

Exhibits 7A, 7B and 7C being wooden box meat, carton meat and sack meat;

Exhibit 9, the tags heretofore mentioned which were signed by the defendant Rodriguez. (Tr. pp. 185, 186.)

Mr. Friedman on behalf of defendants Chevillard and Patron objected to the admission of the said exhibits upon the ground that they were acts and transactions occurring out of the presence of the said defendants and that there was no evidence connecting the said defendants with them in any manner whatsoever and that as to Exhibit 6, the list of meat given to Heuck, and Exhibit 9, the tag signed by Rodriguez, that they were no part of *res gestae* of any action of either of the defendants Patron or Chevillard. (Tr. pp. 186, 187.)

The Court admitted all of the said Exhibits in evidence, to which ruling counsel for these appellants took an exception to the ruling of the Court admitting each of the said Exhibits. (Tr. 188.)

The Government having rested its case, Mr. Friedman, on behalf of Chevillard and Patron, made a motion to strike out certain testimony and Exhibits. This motion and the several grounds thereof are set forth in Assignments of Error, 11 to 16 inclusive, and, as these Assignments are hereafter printed *in haec verba*, we shall not so set them forth at this juncture. Suffice it to say, that the chief points stated in support of the motions that the evidence in question was incompetent and hearsay and related to the acts and declarations of others out of the presence of the defendants Chevillard and Patron, and was therefore not binding upon them. A further

motion was made to strike out the statement alleged to have been taken by the F. B. I. from Chevillard on the ground that the manner in which it was procured was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States, and on the further ground that it was a statement containing a mere narrative of past events and was not corroborated in any other portion of the record as to any of the matters or things set forth therein. The Court denied each of these motions and counsel duly excepted to each of the rulings. (Tr. pp. 189-203, Exceptions Nos. 13 to 27 inclusive.)

Mr. Friedman then moved the Court to direct the jury to return verdicts finding each of the defendants Patron and Chevillard Not Guilty on each of the three counts of the indictment upon the ground that the evidence introduced by the Government was insufficient to support a verdict of Guilty as to each defendant, and that no offense sought to be charged in each count of the indictment had been proved by the Government as against the defendant Patron or as against the defendant Chevillard. (Tr. p. 203.)

The defendants duly excepted to the denial of these motions by the Court. (Tr. p. 204.)

The Court then granted motions of counsel for the defendants Vincenzini and Jacky for directed verdicts of Not Guilty, and the trial thereafter proceeded solely against the defendants Chevillard, Patron and Rodriguez. (Tr. p. 207.)

George Halstead, recalled as a witness for the defendant Rodriguez, produced the recapitulation sheet for three

voyages of the Sea Perch. This document was an analysis of subsistence costs for each voyage. The witness testified that when he went on board the ship, he merely checked the vessel for the orderliness and cleanliness of the stores, and that he did not check the inventories or anything else. Cross-examined by Mr. Friedman, he testified:

“Mr. Rodriguez ordered the food for the ship. He does not actually place the order with any company. The United Fruit Company picks out the supplier of that food. We place it with a firm that has been authorized by the War Shipping Administration for us to do business with. Neither myself nor the chief steward have anything to do with the quality of the meat placed on the ship. That is the Government’s worry.”
(Tr. p. 211.)

The defendant, **Julio Rodriguez**, called as a witness on his own behalf, testified that he was born in Porto Rica, was 44 years old, a citizen of the United States and had been a seaman for 24 years. He had been on the Sea Perch ever since she was commissioned and his present rating was that of chief steward. His son was killed in action in France the previous September. He testified that while at sea he and the defendant Barral prepared separate inventories, Rodriguez preparing one of his own because the inventory prepared by Barral showed less meat than was in the icebox. He denied ever telling Barral that there was more meat on board than the inventory showed and that there was a chance for the two to make some money. (Tr. p. 213.)

Concerning his further dealing with Barral, he testified:

“The ship arrived in San Francisco on December 28. I left the ship December 30. I gave the inventory to Mr. Halstead on our day of arrival. He came aboard the ship. I made the rounds of the storeroom with him. I returned to San Francisco on January 13. Before I left San Francisco I did not have any discussions with Barral about anything having to do with diverting meat from the ship or selling it or anything of that character. Barral didn't report on the ship on the 29th and 30th. From the time the ship docked until I left for New York I had no talk with Barral except to tell him to take care of my department while I am away. When I came back I did not have any discussions with Barral about anything having to do with diverting meat or stealing meat or anything of that character. On January 16 I went to lunch about 2:30. Barral took me to a place to eat some fish. I don't know San Francisco and I don't know the place or the street. I do not know if he took me to the Heuck Company. He took me to a butcher shop or meat company. Barral went up to see this man and he said, 'I have 10,000 to 15,000 pounds of meat I want to sell.' This man said to him, 'Well, I don't know how I can buy this meat. Barral told him he could sell the meat some place and the man said he didn't know about that, that he supplied the ships. Barral said he knew that he was going to supply his ship and said, 'Can you make it so many thousand pounds you deduct from the meat you send, to send 15,000 pounds?' The man said he didn't know how he was going to get away with that and said he would let him know. I started to go. I did not participate in this conversation which lasted about five or six minutes. That morning I had not phoned to anybody to make an appointment to see anybody in the Heuck Company.

I did not talk to Hinman. When we got on the street I was very indignant and I said to Barral, 'What is the meaning of taking me to a place like this and talking of crookedness?' Barral said, 'Well, I want to surprise you to make some money so you can have some money.' I told Barral that I didn't need any money, that I make enough money, and I said, 'Next time you mention a thing like that I will report it to the police,' and I left and reported to the ship. Nothing else was said at that time. After that I never saw or talked to anybody from the meat company or anybody else. I never had any dealings with this meat company before in connection with ordering any meat for the ship. I never saw that man again until I see the man testify against me and I don't know if it is the same man or not."

He emphatically denies that he had any conversations or dealings with either Chevillard or Patron with reference to procuring meat:

"In the period from January 15 to 24, I went to the Normandy Restaurant very often, almost every night. I ate there. I was a regular customer there. I had been there on earlier voyages. I had dinner at the Normandy the night before I went to New York. I know Mr. Chevillard and Mr. Patron. I was introduced to him by Barral about six months ago. I never had any talk with Chevillard or Patron about getting meat off the ship. They never approached me on the question of getting meat off my ship. I never told them I could pick up meat for them. The nature of my relationship with them was just a patron in their restaurant." (Tr. p. 216.)

He further denies all knowledge of any subsequent dealings between Barral and Hinman:

“I never gave Barral any instructions nor told him that he should have any dealings with either Heuck or Hinman of the meat company, or that he should divert the meat or that he should go to anybody about it. I did not know anything about what was going on.” (Tr. p. 219.)

As to the events of January 23d, Rodriguez stated that Barral did not tell him that there was a meat truck on Sansome Street or that he had to go to San Francisco and get the truck or to make arrangements to have the truck driven to Millbrae. He further testifies:

“I did not tell Barral to go to San Francisco to take the delivery tag over to the Heuck Company. I did not excuse him from the vessel to go any place, to do anything in connection with any meat or anything else. I did not have any conversation at all with Barral along the line of going to San Francisco to get a meat truck or take a delivery ticket or anything of that character. All of the afternoon of the 23rd I was about the ship. With respect to the uniform I wear and the rating I have, I am a lieutenant in the Maritime Service.” (Tr. p. 220.)

The appellant George Patron, called on his own behalf, testified that he and Chevillard were partners in the business known as The Normandie Restaurant. About twenty-two months prior to the trial, he took a sea trip on the Monterey, on which he was the chef and Barral the steward. As they were both Frenchmen, they had considerable conversation in their own tongue. (Tr. p. 226.)

Some six months before, Barral told Patron that he expected to have some meat from a meat company. When

Barral asked if he was interested, Patron told him, "Well, you better see my partner because I don't take care of the food handling." Nothing came of this discussion.

Respecting the transactions with reference to the meat in question and his conversations with Barral in regard thereto, he testified:

"I saw Barral in the Normandie after Christmas when he came back from sea. It was two or three weeks from January 23. He said, 'I got some meat and I make arrangements with the manager of the meat company. I hope to get that meat and I hope you fellows can buy it.' I told him I don't take care of the food handling. My duties in the Normandie were to take care of the bar and my partner took care of the food and dining room. When Barral mentioned to me this fact that he expected to have or was going to have some meat and asked me whether or not we were interested, I again referred him to my partner. The next conversation with Barral about meat was a few days before the 23rd. He got mad and said, 'What is the matter?' and I referred him to my partner. I said, 'After all, it looks pretty fishy, that meat of yours, and I don't blame my partner if he doesn't want to go along with you.' That was maybe two or three days before the 23rd. The next time I talked to Barral about meat was on the 23rd at the Normandie Restaurant, about a quarter to four or four in the afternoon. He was alone, and just he and I had the conversation. He said he had a truckload of meat and he has to move it and I said, 'What do you mean, a truckload of meat? Where did you get it?' He said, 'I fix it up with a manager of a meat company.' My partner was away then and I said to Barral, 'Why don't you wait for my partner and do whatever you want to?' Barral said he intended to get a cold storage to store it in and

I said, 'I got no time to go on stuff like that, to wait until my partner comes.' He says, 'I got to get a driver.' I say, 'I don't have no drivers here. I don't drive trucks.' So Barral went away. I thought he was gone for good. Ten or fifteen minutes later he came back with a truck driver, his first name was Lucien. Since this trial started I have learned that his last name was De Angury. This man was pretty drunk." (Tr. pp. 227, 228.)

After relating the details of the trip, the appellant Patron testifies:

"In all the conversations that I have told about or any others that I had with Mr. Barral, from the time he came back from his trip at the end of December until I got back to the Normandie Restaurant on the night of January 23, Mr. Barral never told me there was 15 or 20,000 pounds of meat on the ship that he wanted to sell. He never told me that he had any meat on the ship that he wanted to sell. He never told me that this truckload of meat he expected to get was to be meat that was to go to the ship. Barral never told me that the meat company was going to send a truckload of meat out and bill it to the ship. Barral never told me that anyone connected with the ship or with the Government was to sign any papers for this truckload of meat. Barral never told me that the meat company was going to bill the ship or the Government for this truckload of meat. The first time I realized that the meat in the truck belonged to the Government was when Chevillard popped out. That was when Chevillard said, 'You fooled me. You didn't tell me it was Government meat and it is Government meat.' " (Tr. pp. 231, 232.)

Fernand Chevillard, called on his own behalf, testified with reference to his transactions with Barral as follows:

“I know Mr. Rodriguez by sight. I saw him many times in the restaurant. He came in as a customer. I never saw him anywhere else besides at the Normandie. At all the times I saw Rodriguez he never talked to me about having any meat on the ship that could be sold. He never talked to me about my buying or his selling meat at all. Barral was first presented to me by my partner about five or six months ago at the Normandie. I know from what has been said here that sometime in September Barral went away on a ship on a trip and he came back about the end of December. Before Barral went away on that trip and sometime in September Barral spoke to me about my buying meat from him. That was not the first time I had met him. Some of Barral’s friends were there. Barral says, ‘Do you want to buy some meat?’ I said, ‘Couldn’t be bothered,’ the first time and went on about my business. The next day at the Normandie he says, ‘Did you make up your mind?’ and I said, ‘No, don’t bother me.’ That is all that was said. I suppose the next day I said to him, ‘Where do you get the meat?’ and he says, ‘I am fixing something with the manager of the meat company.’ This was all and he went away. I said, ‘Nothing doing.’ I think it was after New Years that Barral again spoke to me about meat. He says, ‘Are you going to do something this time?’ I didn’t answer. He talked to me about meat many times again—most every other day I should say. He told me the same story. He said, ‘I have got a deal with the manager of the meat company.’ He asked me again, ‘Are you going to do something about it?’ I just walked off. That happened maybe five or six times. It was always in the

course of the evening. I never stopped once to speak to him. He was following me around all the time. I mean he would talk to me about this while I was walking around my place tending to my business and he would come around and stop me. About a week before I was arrested on January 24, Barral repeated to me the same thing. He said, 'I think I am going to have some meat.' I says, 'How much?' He said, 'I don't know, maybe 10,000 or 15,000 pounds.' I said, 'Where did you get that meat?' And he said the manager of some meat company. I asked him what company and he said somewheres downtown. He asked me if I wanted to buy some of it and I said, 'No, don't bother me with that meat, you know a lot of people around here. You speak to the chefs who come around.' Once he came and said, 'Listen, I sell it to you cheap, you want it?' I said, 'What am I going to do with 15,000 pounds of meat? I have got no money.' He said he would sell it cheap 35 or 40 cents a pound, and I said, 'If you give it to me for two bits, I couldn't buy it.' He told me I didn't want to help him and I said that I was sorry. I never told Barral up to January 23 that he had asked anybody to buy some meat. On January 22, in the Normandie, about eleven o'clock at night Barral spoke to me across the partition of the bar. He asked me what I was going to do and I told him to leave me alone. I said, 'I don't want to have nothing to do with that. I have not got the money. I am too busy.' Up to this time there had been no talk as to whether the meat should be kept any place. I then went about my business. About closing time he came to me and said, 'Tell me where I can store it. A store place.' So I studied a while and said, 'All right, I will give you a place, I heard about a place in Millbrae.' He told me he didn't know that town and asked how he was going to go there.

I said I will give you the name and I will draw you something. I drew some lines and put the name 'Millbrae Dairy' there." (Tr. pp. 235-237.)

He further testifies:

"After I gave Barral this map of Millbrae, the next time I saw him was in Millbrae. I did not see Barral on the 23rd at any time before I saw him in Millbrae. Up to the time I gave Barral the map I had never asked him to get any meat for me. I had never asked him to get me meat off the ship. Barral never told me he had some meat from the ship that he wanted to sell. Barral never told me that he saved on the ship 10,000 to 15,000 or 20,000 pounds of meat that nobody knew about and that he had it for sale. Barral never told me with respect to this meat that he was going to get, that it was meat that was to go to the ship or the Government or the War Shipping Administration. Barral never told me that the way they were going to get this meat was that the truck was going to be included in a shipment which was to go to the ship or the War Shipping Administration or was to be left out. Barral never told me that somebody at the ship would sign for it. Barral never told me that the meat company was going to charge this truck load of meat to the ship or to the Government or would present a claim to the ship or to the Government for this meat. Whenever Barral mentioned meat I said, 'Is that right meat?' I never mentioned Government or anything. I said, 'Is it regular meat?' and he said, 'Yes,' and I said, 'You get it right from a wholesale house?' and he said, 'Yes.' Several times I asked him." (Tr. p. 239.)

Also:

"I never asked Barral at any time if he could get any meat for me. I never asked him at any time if he could get me any meat off the ship or Government meat. The first time that I knew that the meat that was in this truck or the meat that was in storage at Jacky's place or that the meat he said he was going to get me was Government meat was when I came to the truck after those big boxes were unloaded." (Tr. p. 243.)

With reference to the purported statement taken by the witness Johnson and Special Agent Fallaw heretofore set forth, Chevillard testified as follows:

"On January 23 I got back to the Normandie Restaurant about five minutes to eleven and was arrested about ten minutes to one. I was arrested at the door of the restaurant. I heard the bell ring and went to open the door. There were five men there and they said to me 'F.B.I.' or 'Federal Bureau of Investigation' or something like that, and they asked me if I was Mr. Patron. I told them no, that I was Mr. Chevillard. They grabbed me by the arm and put the handcuffs on and felt through my pockets. I said, 'What is it?' and they said, 'You know,' and that is all. I told the agents where Mr. Patron was. None of these agents told me what his name was. They took me to the F.B.I. headquarters where I was kept a little over four hours during which they was questioning me from every side. First two men questioned me and then there was another one, and one would go out and another would come, and sometimes there were four men and a man from outside would come inside and open a door and say, 'Are you co-operating?' and then

he would go out and the man in front of me would start again and another would put me another question and I was arguing all the time and I was kind of lost.

That is my name, Fernand Chevillard, on the bottom of each page of U. S. Exhibit No. 18, and I signed that statement. I did not know the names of the two agents who have been identified in this trial as Ronald A. Wilson and Lee M. Fallaw. When they took me to the Field Office nobody told me I had a right to have a lawyer. I asked if I could have a lawyer and they said, 'Yes,' and I said I would like to use a phone and the other agent said, 'Why don't you make a statement,' and I said that I will give him a statement. They told me I could use the phone, but did not show me where the phone was. Nobody asked me whether any promises or inducements were made to me for the purpose of making the statement. I don't recall that I stated to the agents that night that 'about two or three months ago Barral offered to sell me some meat off his ship, but I did not buy any.'

Q. The statement goes on and contains this statement: 'About Thursday or Friday, January 18th or 19th, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship. 30,000 pounds in all, but he wouldn't need it all on the trip and wanted to sell 15,000 pounds of it before it was put on the ship.'

Did you tell that to the agents?

A. No, not like that, no.

Q. Did Barral ever tell you at any time that there was to be meat bought for the ship and that he wanted to sell 15,000 pounds of that meat that was

to be paid by the ship? A. No, sir.

Q. What did you tell the agents about Barral telling you anything about any meat to be sold?

A. The only thing I told the agent that he wanted to sell me some meat, but I was broke and I couldn't buy it.

Q. Did they ask you if Barral told you where the meat was coming from?

A. I don't remember.

Q. Did they ask you whether or not Barral told you it was meat for the ship?

A. I don't know.

Q. What is the answer?

A. I don't know.

Q. Now, the statement on page 2 contains this statement:

'This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself.'

Did you have any discussion with the agents about that?

A. I didn't want to sign because of that certain paragraph there in the statement, because I fight for the word—twenty minutes or a half hour it seemed. There was never no agreement. I never had no agreement with Barral and Patron together and I tried to point it out to them. It was wrong. So one agent would say, when you are talking about something, and suppose he says, 'Barral tells you, are you going to buy something? And you say, Oh, maybe.' He says, 'That is an agreement, isn't it?'

And another would point out something else and ask me if it is an agreement. He kept saying, 'That is an agreement.'

Q. You say that discussion went on for fifteen

or twenty or thirty minutes, at least. Tell me this: How long had they been questioning you before anybody started to write this statement?

A. Well, they wrote a few lines, about ten lines.

Mr. Hammack: I submit the answer is not responsive to the question.

Mr. Friedman: Let's hear the whole answer, maybe it is.

A. They didn't write anything for a long time.

Mr. Friedman: Q. What happened during that time when nothing was being written?

A. They were telling me all kinds of things and I was denying and I says, 'You can't tell me something I don't want to say. I can't tell you that when I didn't do it.' Then they started again.

Q. Then they would write some more, is that right?

A. That's right.

The statement was finally finished after five o'clock in the morning.

Q. Did you read the statement?

A. No.

Q. You signed it, though? A. Yes.

Q. Why did you sign it?

A. Because I told them, 'I am all in and I don't care what you put in there.' I started to argue again about the money side. They said I was going to get something out of it. They said, 'You were going to get something. What were you going to get?' They said, 'You were going to get something.'

I said, 'All right, give me this and I will sign it.'

And that is all.

Q. That was all?

A. That was all, that's right." (Tr. pp. 243-247.)

In conclusion Chevillard testified on direct examination:

"I never had any discussion with Barral as to whether

he should ever get anything out of this meat transaction. I never agreed with Barral that I would pay anything for the meat. I never had any understanding or discussion with Barral whereby I would get any profit if I sold any of this meat for him." (Tr. p. 247.)

Cross-examination by the United States Attorney developed nothing inconsistent with the foregoing testimony. On re-direct examination he denied that he had stated to the F. B. I. Agents that Barral had told him that the meat belonged to the Merchant Marine. (Tr. p. 253.)

After both sides had rested, Mr. Friedman, on behalf of these appellants, moved the Court to direct the jury to return verdicts of Not Guilty as to each of them upon each count of the indictment. The Court denied each of the said motions and counsel duly excepted to the ruling.

After argument by counsel, the Court delivered its charge to the jury, to which counsel took certain exceptions which are set forth in Assignments of Error Nos. 17, 18 and 19. (Tr. pp. 63-67.)

Counsel also excepted to the refusal of the Court to give certain instructions requested by the defendants Chevillard and Patron, which exceptions are set forth in Assignments 20 to 24 inclusive. (Tr. pp. 67-73.) These assignments are hereafter printed in full in conformity with the rules of this Honorable Court.

The jury returned a verdict finding both Chevillard and Patron Not Guilty as to count 1 and Guilty as to Counts 2 and 3. (Tr. p. 27.)

Motions for a new trial and in arrest of judgment were thereafter duly made and were denied by the Trial Court, which thereupon sentenced each of the appellants

to imprisonment for two years upon each of the counts, the sentences in each case to run consecutively. (Tr. pp. 29, 30.)

From the said judgments each of said defendants on March 19, 1945, the same day as that upon which the judgments were rendered and the sentences imposed, appealed to this Court, filing separate notices of appeal. (Tr. pp. 43-46.)

The said appeals are presented on a single transcript pursuant to stipulation of counsel. (Tr. p. 308.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON

Assignment No. I.	(Tr. p. 52.)
Assignment No. III.	(Tr. p. 53.)
Assignment No. IV.	(Tr. p. 54.)
Assignment No. V.	(Tr. p. 54.)
Assignment No. VI.	(Tr. p. 54.)
Assignment No. VII.	(Tr. p. 55.)
Assignment No. VIII.	(Tr. p. 56.)
Assignment No. IX.	(Tr. p. 57.)
Assignment No. X.	(Tr. p. 57.)
Assignment No. XIV.	(Tr. p. 62.)
Assignment No. XVIII.	(Tr. p. 65.)
Assignment No. XX.	(Tr. p. 67.)
Assignment No. XXI.	(Tr. p. 68.)
Assignment No. XXIV.	(Tr. p. 72.)

Assignments III, IV and V all challenge the sufficiency of the evidence to justify the verdict and judgment and will be discussed under a single heading dealing with the insufficiency of the evidence.

Assignment XIV sets forth that the Court committed error in denying the motions made by counsel for these appellants at the conclusion of the Government's case to strike out the confession of appellant Chevillard.

ARGUMENT

1. **THE DISTRICT COURT ERRED IN OVERRULING THE DEMURRERS TO THE INDICTMENT** (Assignment of Error No. 1, Tr. 52).

“That the above entitled court erred in its order overruling the demurrers of each of said defendants to each count of the indictment herein, to which ruling and order each of said defendants duly excepted. (Exception No. 1)”

- (a) **The second count of the indictment does not state facts constituting an offense.**

Count Two of the indictment (Tr. pp. 3-4) charges a violation of 18 U.S.C.A. sec. 80, by alleging that all the defendants did “cover up and conceal by a trick, scheme, and devise **a material fact within the jurisdiction of the War Shipping Administration**” in the manner following: Knowing that the W.S.A. had ordered 64,793 pounds of meat from the Ed. Heuck Co., the defendants diverted and withheld 17,832 pounds thereof and did conceal such fact by “signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed. Heuck Company for approximately 64,793 pounds of meat.”

First, this count is **not** in the language of the statute. The statute prescribes that such offense is committed by

one who "shall * * * conceal and cover up by any trick, scheme or device a material fact * * * **in any matter within the jurisdiction** of any department or agency of the United States * * * ."

The indictment does not allege that such material fact was in a **matter** within the jurisdiction of the W.S.A.; it alleges that the **fact** was within the jurisdiction of the W.S.A.* The indictment does not allege the existence of any **matter**, by either general or special designation, to be within the jurisdiction of the W.S.A.

Thus, count two of the indictment does not charge any offense denounced by the section or any offense at all.

Secondly, no crime could be committed in the manner alleged in count two of the indictment. This count charges that the trick, etc., resorted to by defendants to conceal a material fact, was the "signing and causing to be signed, and issuing and causing to be issued **by the said War Shipping Administration, a receipt to the Ed. Heuck Company** for approximately 64,793 pounds of meat." (Tr. 4.)

Sec. 80, Title 18 U.S.C.A., is but a subparagraph of *Section 35 of the Criminal Code*, and given a separate number in the code solely for purposes of codification. All of Section 35, Criminal Code, deals mainly with frauds upon the United States and contemplates some action on the part of a person which would result in such fraud.

The count does not allege that defendants wrote and presented the receipt; or that such receipt was to be used

*The first count of the indictment, on which appellants were acquitted, charges a fraudulent statement, etc., to have been made "in a matter within the jurisdiction" of the W.S.A. (Tr. 2.)

as a predicate for a false bill or claim against the United States. The count does not allege the doing of any act on the part of defendants whereby they prepared any false receipt or document to be presented to the W.S.A. The count does not allege that either appellant, or any defendant, was an officer, agent or employee of the W.S.A. The count does not allege that the War Shipping Administration did not receive the total amount of meat ordered, in which event the receipt would speak the truth, even though the defendants had contrived to steal 17,000 pounds of meat from the Ed. Heuck Company. The count does not allege how the issuance of a receipt by the W.S.A. could result in any defrauding of the United States.

The count charges that defendants were guilty of a crime because the W.S.A. issued a receipt to some third person.

How a receipt issued by the W.S.A. and given to the Ed. Heuck Company, thus passing out of the hands and control of the W.S.A., could conceal the fact that 17,000 pounds of meat were missing from the shipment does not appear in the charge. Inference and surmise might supply this defect, but all intendments are against the pleader and no inference or surmise can take the place of a necessary allegation in the indictment:

Pettibone v. United States, 148 U.S. 197; 37 L.Ed. 419;

United States v. Louisville, Etc., Co., 165 Fed. 936.

- (b) The second count of the indictment is fatally defective because the receipt therein referred to is not set forth either according to its tenor or according to its substance.

It is an elementary rule of criminal pleading that where a written instrument is referred to in the indictment the same must be set forth according to its tenor with particularity and certainty in the absence of averments excusing the omission to set it forth, such as that it has been lost or destroyed or that it is in the possession of the accused.

A further exception sometimes arises where the indictment or information alleges that the written instrument is so voluminous that it is impracticable to set it forth in its entirety. None of these exceptions is applicable to the case at bar, where the written instruments were in the possession of the prosecution and were introduced in evidence, and where the information contains no allegation excusing the failure to set them forth.

The rule requiring the setting forth of a written instrument in *haec verba* has been applied with great strictness in the leading cases. The rule is thus stated in 27 *Am. Jur.* 647:

“It is the general rule in the absence of statute, that an instrument referred to in an indictment must be set forth according to its tenor with particularity and certainty, or the omission to do so excused by proper averments, such as that it has been lost or destroyed or that it had remained in the possession of the accused; according to some authorities an exact copy of the writing must be set forth in the indictment.”

In 42 *C.J.S.* 1055 it is said:

“When printed or written matter enters into an offense as a part or basis thereof, it should be set forth in the indictment at least in substance, and where constituting the gist of the offense it has been held by some authorities that an instrument should be set forth in *haec verba* or according to its tenor, and that a mere statement of its effect is insufficient. Where a writing is merely incidental, or is relied on as proof of the fact charged and not in itself an offense, or where the voluminous or obscene character of the instrument, or its loss or absence, precludes its being put into the record it may be described generally without being set forth.

In the latter case the indictment should aver the reason for failure to set forth the instrument and should describe it in substance and with sufficient particularity.”*

In a note in *Ann. Cas.* 1914B 661, it is said:

“The word ‘tenor’ has been frequently considered by the Courts as to its meaning used in an indictment for crime. It has been universally held in this connection that generally an indictment ‘requires **an exact copy, that the instrument set forth in the criminal pleading must be set forth in the very words and figures**’.”

In *United States v. Watson*, 17 Fed. 145, the Court, sustaining a demurrer to an indictment for conspiracy which alleged the sending of a written statement to a

*All emphasis appearing in quotations herein, unless otherwise noted, have been supplied by the writer.

public official as one of the overt acts in furtherance of a conspiracy, says:

“By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff’s case, it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce. The information does not undertake to give the substance of the document mentioned, but only its effect.”

In *State v. Henderson*, 135 Iowa 499, 113 N. W. 328, it is said:

“The rule is elementary that where basis of an offense is a written instrument, it should be set forth in *haec verba*, or else the substance stated.”

In *Moody v. People*, 65 Colo. 339, 176 Pac. 476, the defendant was convicted of embezzlement, the information describing the paper alleged to have been stolen as “one bank check of the value of \$3,800 of the personal property of Rosa Bruggebos”. Reversing the conviction, the Supreme Court of Colorado says:

“A written instrument which is the basis of larceny must be described with reasonable certainty or there should be an averment showing why a more particular description cannot be given. This rule requires that the instrument should be so set out that it may be identified and known, or there must be an averment showing good reason for not doing so, as that it has been destroyed or is in the possession of the defendant.”

Almost a score of decisions are cited in support of his statement.

Tested by even the most liberal rules of pleading, the second count of the indictment is fatally defective because it gives none of the necessary data. That the failure to set forth the receipt according to its tenor was inexcusable and not within any exceptions to the general rule requiring the setting forth of such an instrument in *haec verba*, is apparent from the fact that the receipt itself which was introduced in evidence at the trial (Tr. pp. 205, 207) is brief and could have been conveniently set forth in the indictment, and was in the possession of the Government.

(c) The third count of the indictment does not state an offense.

Under the third count of the indictment defendants were charged with a conspiracy to commit offenses against the United States. (Tr. 5.) The indictment alleges that the conspiracy was to commit three separate crimes as follows: (1) to cause the Ed Heuck Co. to present a claim, false in part, to the War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, each defendant well knowing that only 46,961 pounds of meat would actually be delivered to the W.S.A. by the Heuck Co.; (2) by making false statements and representations in a matter within the jurisdiction of said War Shipping Administration that approximately 64,793 pounds of meat had been received by the W.S.A. when in fact only 46,961 pounds of meat had been delivered; and (3) by resorting to a trick, scheme and device to conceal a material fact from the W.S.A. to wit: that

defendants had diverted to their own use approximately 17,832 pounds of meat from a shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of the W.S.A., said device for concealment being that defendants caused the War Shipping Administration to sign and issue a receipt for the smaller poundage of meat.

As to the allegation that they conspired to have the Heuck Company present a false claim to the War Shipping Administration the count fails to state any offense cognizable in the Federal Courts. The statute relating to false claims (18 *U.S.C.A.* 80) relates specifically to the presentation of a claim for the **payment of money or property** by the United States. This was expressly held in the case of *United States v. Cohn*, 270 U.S. 339, 345, 70 L.ed. 616, 619.

On the very face of the indictment it is manifest that such claim was not to be filed for the purpose of procuring any meat (property) from the United States and it fails to allege that such claim was to be presented for the payment of any money. This allegation of the count not constituting an offense there could be no criminal conspiracy to do the things so enumerated.

The third allegation of this count relating to the resort to a trick or device to conceal a material fact by the War Shipping Administration issuing a receipt to the Ed Heuck Co. has been heretofore discussed under the sufficiency of the second count of the indictment. This could not constitute an offense under the very facts alleged.

Assuming that the remainder of the conspiracy charge is sufficient to show an offense denounced by statute

the query remains, is this count of the indictment valid?

It is our understanding that the Grand Jury determines for what offense a defendant shall be placed on trial. The court must proceed to determine whether the defendant has done the things charged by the Grand Jury. No court can draw the conclusion that the Grand Jury would have acted in a different manner if other facts had been presented to it. A court cannot determine that matters alleged in an indictment and which constitute a greater portion of the charge are but surplusage and can be rejected. This would be to substitute the opinion of the court for the judgment of the Grand Jury. In the instant case no one, not even a court, could determine that the Grand Jury would have returned an indictment charging a conspiracy merely to resort to the making of false representations to the War Shipping Administration. It must be assumed that the reason a Grand Jury returned the indictment was because the members believed that all of the things set forth therein constituted an offense and were material to the charge.

In *Naftzger v. United States*, 200 Fed. 494, 496, the Circuit Court of Appeals announces the applicable principle as follows:

“Counsel for the government contend that the recital of the indictment that the stamps were stolen from ‘certain post offices in the state of Kansas’ is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of

the grand jury only—a co-ordinate branch of the court. It is for that body, and for no other officer, to say what shall and what shall not be charged, because the fifth amendment to the constitution declares that: ‘No person shall be held to answer * * * for an infamous crime, unless on a presentment or indictment of a grand jury.’”

In *Ex Parte Bain*, 121 U.S. 1, 9; 30 L.Ed. 849-852, the Supreme Court, commenting on the action of the trial judge in striking out four words from an indictment, stated as follows:

“But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. * * * How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions or what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner’s trial for a crime, and without which the Constitution says ‘no person shall be held to answer,’ may be frittered away until its value is almost destroyed.”

In the instant case the Grand Jury acted upon the third count of the indictment believing that two-thirds thereof constituted offenses against the United States. No one can say that a sufficient number of the Grand Jurors would have agreed to any other kind of indictment or to an indictment containing less than set forth in count three. As two-thirds of this count do not state offenses which can be the subject of a criminal conspiracy the indictment was insufficient to place defendant on trial for the charges contained therein.

2. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSE SET FORTH IN COUNT TWO OF THE INDICTMENT (Assignment of Error No. 3, Tr. 53).

“The court erred in denying the motion of each defendant for a directed verdict of not guilty upon Counts Two and Three of the indictment, which motion was made at the close of all the testimony and evidence in the case. Each of said motions on behalf of each defendant was made upon the ground that all of the evidence introduced in the case was and is insufficient to support either a verdict or judgment of guilty as to each count and that no offense sought to be charged in each count of the indictment had been proved by the evidence as against the defendant Patron or against the defendant Chevillard. The Court denied each of said motions for directed verdicts to which ruling of the court each of said defendants excepted. (Exception No. 29.)”

Assignment of Error No. 4, Tr. 54.

“That the evidence in the case was and is insufficient to establish the offense set forth in Count

Two of the indictment as against the defendant Chevillard or against the defendant Patron.”

The second count of the indictment charges defendants with resorting to a trick and device to conceal a material fact from the War Shipping Administration and alleges that this was accomplished by causing the War Shipping Administration to issue a receipt for a greater poundage of meat than it actually had received from the Heuck Company.

There is absolutely no evidence to establish that either the defendants Chevillard or the defendant Patron did any such thing, or aided and abetted another in doing such thing.

Before discussing the evidence it is well to point out that the receipt (Government Exhibit No. 5, Tr. p. 205) on which this count of the indictment is based was issued and signed by the checker before the meat was transported from the place where it had been placed by the Heuck Company.

It should also be remembered that the appellants herein were not charged with stealing any meat from the Government or with stealing any meat from the Heuck Company. The evidence as a whole indicates no more than that the appellants were willing to avail themselves of the meat, but that they at all times believed the meat to be originally and finally owned by the Heuck Company up to the very moment it was conveyed in the truck to Millbrae.

We emphasize that there is no evidence to show that either Chevillard or Patron had anything to do with the issuance of any receipt or with the signing thereof

or had consented, agreed, counseled or advised that such receipt should be signed. We also emphasize the fact that there is absolutely no evidence to establish that either Chevillard or Patron had any knowledge of the following things, to wit: (a) that the Sea Perch was owned or operated by the United States; (b) that the person who was to sign the receipt, either the ships steward or the checker, was a member or employee of the War Shipping Administration or of any other governmental agency; (c) that the receipt was to be presented for signing to any person connected with the War Shipping Administration or with any other governmental agency.

Even if it be assumed—which the evidence does not establish—that appellants knew some sort of receipt was to be signed by someone, there is no evidence to establish that either appellant knew it was to be signed by anyone connected with the War Shipping Administration or any governmental agency. Neither does the evidence establish that they knew what kind of receipt was to be presented or signed or that such receipt was to be for an amount greater than the actual poundage involved in the delivery.

As these things do not appear in the evidence it should be manifest that there was a total failure of proof so far as the second count of the indictment is concerned. To establish this count the Government had to prove that the matter of the ordering and delivery of the meat was one within the jurisdiction of the War Shipping Administration; that appellants knew of this fact and so knowing intended that the receipt be issued, presented to a member of the War Shipping Administration or some authorized person connected therewith for signing and that they further knew that such receipt would be for a larger

amount than the meat actually delivered. These things were never established by the Government, save that the meat was ordered by the W.S.A. While the evidence may be construed as establishing that appellants were not loath to become parties to converting a truckload of meat belonging to the Ed Heuck Company, this would not establish the charge set forth in the second count. Appellants were not on trial for stealing any meat. The diverting or stealing of the meat is only incidental to the charge. The charge is resorting to a trick and device to conceal a material fact in a matter within the jurisdiction of the W.S.A. We have heretofore argued that such trick or device must consist of some affirmative action in the nature of a subterfuge performed by appellant and which would lead the W.S.A. along a course which would prevent knowledge of the true state of affairs. The issuance of a receipt or other document by the W.S.A. does not fall within this category. Appellants cannot be guilty of some act performed by the W.S.A. They can only be guilty of some act they performed or aided or abetted in the performance thereof. If there be such an offense the only thing appellants could have been guilty of was procuring the issuance of a receipt by the W.S.A. by fraud.

However, the evidence fails to establish that either appellant did anything relating either to the issuance of the receipt or the procurement of the signature of the checker thereto.

The substance of the entire evidence as to appellants is set forth in the abstract of the case; and it amounts to merely this: the dealings of appellants in regard to the meat were exclusively with the defendant Barral, who pleaded guilty and testified for the Government, who was

an admitted accomplice as a matter of law, and whose testimony therefore should be looked upon with great distrust and should not be the sole basis of a conviction.

Indeed, the learned trial judge instructed the Jury that the testimony of an accomplice was to be received with caution and

“weighed and scrutinized with great care, and the jury should not rely on it unsupported, unless it produces in their minds a most positive conviction of its truth.” (Tr. p. 263.)

Barral first testifies to a conversation with Chevillard and Patron sometime in September of 1943. At that conversation the appellants merely asked if the witness could get meat “from anywhere.” After the witness answered in the negative, nothing further was said; and the appellants did not ask Barral if he could get meat from the ship. (Tr. p. 125.) After the return of Rodriguez from New York on January 13, 1945, Barral testifies that he went to the Normandie Restaurant and interviewed Chevillard and Patron, telling them that he **might get** some meat for them, and they answered that they were ready to take the meat at any time. (Tr. p. 127.) The only testimony of the witness tending to show knowledge on the part of either of these appellants as to how the meat was obtained is as follows:

“I told Chevillard and Patron how I was going to get the meat, and about the delivery tags, in the Normandie restaurant on the 18th or 19th of January. I told them that **we would get the meat, ‘not from the ship but from the meat company,** that we had the meat on the ship, twenty or twenty-five thousand pounds of meat, and that we got a truck that

would go to their place.' **I told them the meat would be coming from the meat company.** I said the meat was a truckload, instead of going on board the ship it would go to their place, that meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says, 'The bill will be signed by the ship's steward or the checker.' They said to let them know when we would be ready to deliver the meat." (Tr. p. 131.)

The rest of the testimony of this witness, in so far as it involves either Chevillard or Patron, deals solely with the procurement of the drunken De Angury to drive the truck, and the difficult trip to Millbrae with the meat.

On cross examination, he merely says:

"On Wednesday in the evening about 9 or 10 o'clock I spoke to Patron first at the Normandie and told him that we would talk **to the manager of the meat company,** and I told him we had thirty thousand pounds of meat they had left on board the ship and that nobody knew about it and that **we could get one truckload from the meat company and send that meat to them.** *I told Chevillard the same thing.*" (Tr. p. 140.)

Giving full faith and credit to the testimony of the accomplice, it is apparent that all that either of these appellants did was to agree to take the meat, and to accompany the truck to Millbrae, where it was placed in storage. Neither had anything to do with the issuance of the receipt or its being signed by anyone and there is no testimony that either of them entered into any agreement that such a receipt would be issued or signed. Neither of them had the power to issue the receipt, nor did they have any influence over any person whose duty it was to issue or sign it. The only testimony that they even knew

that the meat would be receipted for is the vague statement of the accomplice that he told them that the bill would be signed by the ship's steward or the checker.

Neither can the conviction be sustained on the theory that either appellant aided and abetted in the issuance or signing of the receipt or on the theory that a conspiracy existed for such purpose. Before one can be guilty as a principal in a crime he must either directly commit the act or aid, abet, conceal, command, induce or procure its commission. (18 *U.S.C.A.* 550.) Likewise, before a person may be guilty as a principal he must entertain the same criminal intent as the one who actually commits the crime. There must be a community of unlawful purpose at the time the act is committed. (22 *C.J.S.*, sec. 87, p. 155.) In the instant case there is no evidence establishing that either Chevillard or Patron aided, abetted, counselled or advised the making of any false statement to the War Shipping Administration or the concealment of any material fact from the War Shipping Administration or the resort to any trick or device, including the issuance of the receipt by the War Shipping Administration, to conceal a material fact from that agency. The sole unlawful activity of either appellant, as disclosed by the evidence, is the conversion of the truckload of meat from the Heuck Company. There is no evidence to establish that either appellant ever intended to purloin any meat from the United States or any agency thereof or to conceal such fact from any agency of the United States.

Neither can the theory of conspiracy support the convictions. While it is true that where persons conspire to commit a crime all are equally guilty for the perpetration

of an act done by a co-conspirator in furtherance of that crime, it is equally true that the scope of the conspiracy cannot be enlarged by adding the independent and voluntary acts of another conspirator. If the evidence established any conspiracy in this case, which we deny, such conspiracy could only have been to convert the meat of the Ed. Heuck Co. This was the assurance given time and again by Barral to appellants. Nowhere does he testify that he informed appellants that a receipt was to be issued by the Heuck Company and signed by a representative of the War Shipping Administration. Neither does he testify that he informed appellants any such receipt was to be for a greater amount than the poundage of meat actually to be delivered.

Barral's vague statement that he told appellants that the **bill** would be signed by the ship's steward or the checker, a mere voluntary statement on Barral's part (Tr. p. 131), does not make the issuance and signing of a receipt by the W.S.A. any part of the conspiracy.

A fuller discussion of the question of conspiracy will be set forth under the heading dealing with the sufficiency of the evidence as to the conspiracy count of the indictment. Suffice it here to say that neither as aiders and abettors or as co-conspirators did either of the appellants have anything to do with the issuance of a receipt by the Heuck Company or with the signing thereof by any representative of the W.S.A. It was no part of appellants' understanding, they never agreed to it, they had no knowledge of the procedure involved in the ordering by and delivering of meat to the W.S.A., they did not know that either Rodriguez or the checker or Barral were members or connected with the W.S.A. In fact, appellants' sole purpose

and idea was to procure meat from the Heuck Company and not from any agency of the United States.

In regard to the appellant Patron it must be remembered that the statement of Chevillard taken by the FBI (Government's Exhibit 18), was not admitted against Patron and cannot be considered in determining the sufficiency of the evidence to support his conviction.

There is nothing in Chevillard's statement (which was procured in violation of the due process clause of the Constitution and should have been stricken out) that changes the foregoing effect of the evidence. There is nothing in this statement that has anything to do with the issuance or signing of any receipt.

Finally, there is nothing in the evidence to establish that either Chevillard or Patron knew or understood that the War Shipping Administration or the United States would lose one penny as the result of a transaction which had for its object the conversion of meat belonging to the Heuck Company.

The evidence does not establish anything other than that Barral represented to Patron and Chevillard that he had made arrangements with the meat company to get a truckload of meat and it was as to this truckload of meat that appellants directed all their activities. The evidence is fully susceptible of the conclusion that Chevillard and Patron understood that this was a private deal between the manager of the meat company and Barral whereby the manager had agreed to make available to Barral a truckload of meat.

The evidence was wholly insufficient to establish the charge set forth in the second count of the indictment.

3. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CONSPIRACY SET FORTH IN COUNT THREE OF THE INDICTMENT (Assignment of Error No. 5, Tr. 54).

“That the evidence introduced in the case was and is insufficient to establish the offense set forth in Count Three of the indictment as against the defendant Chevillard or against the defendant Patron.”

Assignment of Error No. 3, *supra*.

Conspiracy is charged in the third count of the indictment (Tr. p. 5) and is alleged to have consisted in the doing of three things. We will discuss each of these matters and demonstrate that the evidence was utterly insufficient to establish this charge.

First, the count alleges that the conspiracy was for the purpose of having the Heuck Company present a false claim to the W.S.A. The evidence is silent as to any such arrangement.

Barral's testimony (Tr. pp. 123-151) contains no statement that he ever discussed with either Chevillard or Patron or Hinman, manager of the Heuck Company, anything about a false or other claim being presented to the W.S.A. or the United States.

Hinman's testimony is likewise silent as to anything being said about presenting a false claim for the payment of money to the Government. (Hinman only talked with Rodriguez and Barral—not with either appellant.) Hinman testified that on his only meeting with Barral and Rodriguez the latter stated

“that he was willing to see that my company received receipts for the delivery of the entire order, but that up to 25,000 pounds of that order should not actually be delivered to the ship, that we were to bill the en-

tire quantity as ordered and dispose of a portion not delivered for our mutual profit." (Tr. p. 91.)

On cross-examination he stated that

"Both (Rodriguez and Barral) insisted that we would be given a receipt for the entire order." (Tr. p. 100.)

Referring to the receipts (U.S. Exhibits 5 and 9) the witness stated that "It was the **delivery tag** from which we prepare our billing against the War Shipping Administration for delivery to their agents the United Fruit Company for collection of our charges." (Tr. p. 96.)

The only talk relative to any document, between Hinman, Rodriguez and Barral, was relative to the so-called receipt or, as Hinman more correctly puts it, the delivery tag. Nothing was ever discussed about presenting any claim to the W.S.A. for payment.

Neither appellant ever entered into any arrangement with Barral or anyone else whereby it was agreed or understood that the Heuck Company should ever present for payment a claim (false in whole or in part) to the W.S.A., or that such persons agreed together to cause the Heuck Company to present such claim.

The testimony is in sad confusion as to just what claim was ever presented to the W.S.A. by the Heuck Company for payment. Appellants' counsel attempted to ascertain this fact but the trial court precluded him from so doing. Assuming, for argument, that a claim was presented and it was false in part, this does not make appellants guilty of either causing or conspiring to have such claim presented.

It is the recognized rule that where one does an act, which is not a crime against the United States at the time of its commission, such person is not criminally responsible for the subsequent criminal act or another over whom he neither had or exercised any control. Stated differently, no one is criminally liable who merely creates the means which other persons use to commit a crime. Such is the law as announced by our Federal Courts in the following cases:

United States v. Fox, 95 U.S. 670; 24 L. ed. 538;
Terry v. United States (C.C.A. 8) 131 Fed. (2d) 40;
Lowe v. United States (C.C.A. 5) 141 Fed. (2d) 1005.

The presenting of a false claim to the W.S.A. not being part of the conspiracy, even under the testimony of Baral, the independent act of the Heuck Company in presenting a false claim cannot make such action of the Heuck Company part of the conspiracy between the named defendants.

Furthermore, mere knowledge, acquiescence or approval of the act, without the co-operation or agreement to co-operate is not enough to constitute one a party to a conspiracy. There must be an intentional participation in the transaction with an intent to further the common design and purpose:

Zito v. United States, 64 Fed. (2d) 772;
Thomas v. United States, 57 Fed. (2d) 1039;
Young v. United States, 48 Fed. (2d) 26.

The second alleged means by which the conspiracy was to be furthered was by the defendants making and causing to be made false statements and representations to the

W.S.A. as to the amount of meat actually delivered. Again we reiterate the fact that there is nothing in the evidence to show that appellants knew that any statement was to be made to the War Shipping Administration or anyone connected therewith. The evidence does not establish that appellants knew that either Rodriguez or the checker were in any way connected with the W.S.A. There is no evidence to show that appellants knew that any representation of any kind was to be made to the W.S.A. or that any delivery tag or receipt was to be delivered to that agency as a representation of the amount of meat delivered, whether such tax or receipt was true or false.

All that appellants could possibly be charged with is a conspiracy to purloin meat from the Heuck Company and no more. This is the only act they participated in and did so merely on the representations of Barral that he had arranged with the meat company for a truckload of meat.

All that we have said as to the conspiracy to file false claims applies with equal force to this phase of the third count of the indictment.

Lastly, the indictment charges that the alleged conspirators were to conceal the diversion of 17,832 pounds of meat by the trick and device of having the War Shipping Administration issue a receipt to the Heuck Company for a larger amount of meat. We have discussed this phase of the matter under the sufficiency of the indictment and will not repeat such arguments here. We content ourselves with merely stating that the conspiracy, if any, of which appellants were a part, was merely to procure the truckload of meat. This meat never was the property of the United States, was never intended by the

Heuck people to be the property of the United States and was never understood by appellants to be the property of the United States. Because the Heuck people saw fit to tender a delivery tag to someone connected with the W.S.A., a matter which appellants never knew of or agreed to, cannot be made a part of the conspiracy. There has never been any allegation or contention that Hinman or the Heuck Company were parties to the conspiracy. Their acts were the acts of individuals and appellants cannot be made criminally responsible for such acts under the authorities and for the reasons hereinabove cited.

It is important to note that the receipt for the meat shipment was not executed as the result of anything done by appellants. The receipt was signed by the checker Brandt-Neilsen because he shirked his duties and did not ascertain the quantity of meat upon the pier. No one, including Rodriguez and Barral did anything to induce the checker to sign this receipt. How the parties could have conspired to bring about a result over which they have absolutely no control does not appear from the evidence.

The evidence is entirely susceptible of a construction that there were two conspiracies operating at the same time, one between Barral and Hinman, manager of the meat company, whereby Hinman was to divert meat of the company to the use of Barral, the other conspiracy being one between Barral and appellants whereby appellants were to avail themselves of the meat so converted. Whether Rodriguez was a member of either or both of these conspiracies we leave to the arguments of his own counsel.

The law is well settled that where several defendants are charged with one major conspiracy, proof of several

independent conspiracies in each of which two or more, but not all of the defendants are involved, does not establish the conspiracy charged. This doctrine has been announced by this and other Federal courts in many cases of which we cite but a few:

Terry v. United States, (C.C.A. 9) 7 Fed. (2d) 28, 30;

Tinsley v. United States, (C.C.A. 8) 4 Fed. (2d) 891;

Minner v. United States, (C.C.A. 10) 57 Fed. (2d) 506, 512;

Thomas v. United States, (C.C.A. 10) 57 Fed. (2d) 1039.

Thus, the evidence fails to establish any one of the offenses which the count charges the appellants conspired to commit.

4. THE COURT ERRED IN REFUSING TO DIRECT THE WITNESS HINMAN TO PRODUCE THE BOOKS OF THE ED. HEUCK CO. (Assignment of Error No. 6, Tr. 54).

“That the court erred in refusing, on motion and request of defendants, to direct Government witness, Elroy Hinman, during the course of his cross examination, to produce the books of the Ed Heuck Company, which contained a record of what was billed against the United Fruit Company, War Shipping Administration, as more fully appears as follows: The witness had testified that he was manager of the Ed Heuck Company and had supervision of the sending of the meat to the Sea Perch and that such meat was 17,000 pounds less than the amount shown in the receipt marked as Government’s Exhibit 5; that the books of said company contained a record of what was billed against the United Fruit

Company, War Shipping Administration, together with the quantity and amount of deliveries that the bill represents; that such books were under his general supervision.

Mr. Friedman: Might I ask that the witness be instructed to produce the books?

The Court: I do not know that there is any reason for the granting of that.

Mr. Hammack: To which I object, as to what the books show in regard to billing; it would be improper cross examination.

The Court: Unless some more adequate reason is shown I will deny it.

Mr. Friedman: I will wind this up by stating that while this witness ordered 66,000 pounds of meat to be placed upon the various trucks and ordered 17,000 pounds, approximately, placed in one particular truck, and that this witness said as far as he knows the only amount of meat that was made up and delivered to the Sea Perch that day was the 66,000 pounds less the 17,000 pounds, that even for the purpose of testing this witness' recollection or even impeaching his testimony I have a right to see the books that are under his supervision.

The Court: I do not think there is any materiality to your point. I will sustain the objection.

Mr. Friedman: Note on exception. (Exception No. 5)."

It needs no extended argument or citation of authorities to demonstrate the error of this ruling. The books of the Heuck Company probably would have revealed the actual delivery to the Sea Perch of the entire quantity of meat called for in the order or the books would have shown the exact amount for which the War Shipping Administra-

tion was billed, thus refuting the charge that a false claim had ever been filed with the War Shipping Administration. In any event the cross-examiner had the right to test the recollection of the witness or to impeach his testimony by the books. Broad and liberal cross-examination should be permitted for the purpose of refreshing the memory of the witness or testing his recollection. (70 *Corpus Juris*, 689.)

No bill or claim of any kind was ever produced as having been presented for payment to the W.S.A.

5. **THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE WITNESS DEAN HEUCK** (Assignment of Error No. 7, Tr. 55).

“That the court erred in limiting the cross examination of the witness Dean Heuck, produced by the Government, as more fully appears as follows. The witness had testified that he was a general partner of the company that supplied the meat to the Sea Perch.”

Exception No. 6

“Q. I see. Who did you bill for this meat?

Mr. Hammack: I object to that, may it please Your Honor, on the ground it is improper cross examination.

The Court: I will sustain the objection. An exception may be noted on behalf of all defendants.”

Exception No. 7

“Mr. Friedman: Q. Was your company ever paid for the meat?

Mr. Hammack: Same objection, your Honor.

The Court: Same ruling, same exception.”

The objection of the District Attorney to the questions set forth above was not well taken and should have been

overruled. It was proper to inquire as to whom the bill was sent and especially from a general partner in the Heuck Company. All through the case the questions were paramount as to how any concealment of a shortage had been accomplished and whether any false claim had been filed with the W.S.A. and if anyone intended or conspired to file such a claim. Appellants had the right to show that the W.S.A. was not billed for any meat in excess of the amount actually delivered. This they had the right to develop from a partner in the firm from whom the meat was ordered.

6. THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE WITNESS BARRAL (Assignment of Error No. 8, Tr. 56).

“The court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, which more fully appears as follows:

Q. What was it you pleaded guilty to?

Mr. Hammack: I object, your Honor. The indictment speaks for itself.

Mr. Friedman: I am trying to find out what this man thought he pleaded guilty to.

Mr. Hammack: It is not a question of what he thought he pleaded guilty.

The Court: I sustain the objection. I think that is a legal question.

Mr. Friedman: Exception, your Honor.

The Court: Exception noted.”

Assignment of Error No. 9, Tr. 57.

“That the court erred in limiting the cross examination of the witness Pierre Barral, produced by the Government, as more fully appears as follows:

Q. You pleaded guilty, but you don't know how many charges you pleaded guilty to, is that right?

A. No, I don't know how many charges.

Q. Do you know how long you could be sent to jail?

Mr. Hammack: I certainly object to that as improper cross examination, immaterial, irrelevant and incompetent.

The Court: I will sustain the objection.

Mr. Friedman: Might I call the Court's attention to this?

The Court: I do not think it is necessary to argue this. You have your objection and I have ruled on it.

Mr. Friedman: May we have our exception?

The Court: Yes."

(The foregoing constitute Appellant's Exceptions 9 and 10 and will be found in the Transcript as pages 134 and 151.)

Barral had turned Government's witness after having plead guilty to the charges in the indictment. His testimony was the only evidence in the case on which the Government could base any claim that appellants were guilty. Without Barral's testimony a directed verdict of not guilty would have been inevitable. Under such circumstances the most searching cross examination was demanded and should have been accorded to appellants as a matter of right and justice. As said in the case of *Alford v. United States*, 282 U.S. 687; 75 L.ed. 624:

"The present case, after the witness for the prosecution had testified to uncorroborated conversations with the defendant of a damaging character, was a proper one for searching cross-examination."*

*In the *Alford* case the witness was not a co-conspirator or accomplice as was Barral in the case at bar. All the reasoning of the *Alford* case, as above and hereafter set forth, applies with greater force to the instant case.

Appellants, on cross examination, had the right to impeach and discredit the witness Barral; they had the right to show that he was testifying either under the promise of immunity or leniency or **under the expectancy of receiving leniency**. That the facts justified the conclusion that Barral was testifying under some expectation or hope of leniency is made apparent when we consider that Barral had pleaded guilty (to what crimes and how many crimes he said he did not know) and was awaiting the pronouncement of judgment and sentence of the court (Tr. p. 123), and was in the custody of the U.S. Marshal. (Tr. p. 14.)

The three offenses in the indictment, to which Barral pleaded guilty, carried with them maximum, consecutive sentences of 22 years and fines totaling \$30,000. The severity and length of the sentences that could be meted out to Barral were matters that the jury had the right to consider in determining his credibility.

In *Alford v. United States, supra*, the main witness for the Government was asked on cross examination where he lived. The court sustained an objection to this question. Defendant's counsel stated that he asked the question in order that the jury might know who the witness was and, further, that he had been advised that the witness was in the custody of the Federal authorities. The Supreme Court reversed the convictions solely on the ground that the action of the trial court, in cutting off such proper cross examination *in limine*, was prejudicial error requiring a new trial. Pertinent portions of the Supreme Court's opinion are as follows:

“Cross examination of a witness is a matter of right. The Ottawa, 3 Wall. 268, 271, 18 L. ed. 165,

167. Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased (citing cases).”

The Supreme Court then points out that cross examination is necessarily exploratory and the cross-examiner need not state to the court what facts he expects to elicit. Then the court states:

“But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. *King v. United States*, 50 C. C. A. 647, 112 Fed. 988, supra; *Farkas v. United States* (C.C.A. 6th) 2 F (2d) 644, supra, and cases cited; *People v. Becker*, 210 N. Y. 274, 104 N. E. 396, supra; *State v. Ritz*, 65 Mont. 180, 211 Pac. 298, and cases cited on p. 188; *Rex v. Watson*, 32 How. St. Tr. 294. Nor is it material, as the court of appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with

some other offense by the prosecuting authorities, *petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention.*”

In *Farkas v. United States*, (C.C.A. 6) 2 Fed. (2d) 644, the court deals with the right of cross-examination, under similar circumstances, as follows:

“The prosecuting witnesses, before the time of the trial, had pleaded guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible; they are, however, rarely made. Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney **but anything else that would throw light upon the prosecuting witnesses’ state of mind.** It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.”

It became most important to discover exactly what offenses the witness Barral thought he had pleaded guilty to. The objection of the District Attorney that "The indictment speaks for itself," was not well taken. The line of inquiry did not seek to establish what offenses, as a legal proposition, the witness had in fact pleaded guilty to having committed; but **the inquiry sought to develop what offenses the witness believed he had pleaded guilty to having committed.** If his answer merely showed his belief that he had entered his plea to a minor offense, then such fact could be considered but lightly by the jury; on the other hand, if he stated that he knew his plea had been entered to the particular crimes set out in the indictment, then such fact was worthy of the deepest consideration by the jury in determining whether he was testifying under the expectation of leniency or immunity.

For like reasons the jury had the right to know and consider just what maximum sentences the witness understood could be meted out to him.

Both of the facts sought to be elicited by the cross-examination were the proper subjects of investigation and the court should have allowed the witness Barral to answer. As said in the Alford case, each appellant "was entitled to show by cross-examination that his testimony was affected by fear or favor."

7. THE COURT ERRED IN ADMITTING THE SIGNED STATEMENT OF THE DEFENDANT CHEVILLARD (Assignment of Error No. 10, Tr. 57).

"The court erred in admitting in evidence, during the direct examination of Dallas A. Johnson, a witness produced by the United States, the signed statement of the defendant Fernand Chevillard, as

against the defendant Chevillard only, as more fully appears as follows:

Exception No. 11.

Mr. Hammack: At this time we will offer this statement in evidence as against Mr. Chevillard only.

Mr. Friedman: I will object to it on the ground that it is a mere narrative of past events, and that neither of the offenses charged in this indictment has been established and therefore that extra judicial statements are inadmissible until the corpus delicti has been established.

The Court: I will overrule the objection, and an exception may be noted.

Mr. Friedman: It will be understood that my objection is as to each count of the indictment?

The Court: Your objection goes to the introduction of the exhibit, doesn't it?

Mr. Friedman: In so far as each count is concerned; in other words, I wish my objection to appear as three objections, one to introducing it in support of the first count, the second count, and third count of the indictment.

The Court: I have never heard of that being done, but if you wish it you can have three objections and I will make three orders overruling them and three exceptions.

Mr. Friedman: Yes, because it may be inadmissible on one count and (not) admissible on the other.

The Court: All right."

(The statement of Fernand Chevillard was marked U. S. Exhibit 18.)

The statement of Chevillard (U.S. Exhibit 18) is quite lengthy and is set forth in full in the Record on pages 168 to 172 inclusive. It is also set forth in full in our statement of the case, *supra*, p. 33.

It is fundamental that the *corpus delicti* must be established by evidence other than the extrajudicial statements or confessions or admissions of a defendant,

Ryan v. United States, 99 Fed. (2d) 864;

Goff v. United States, 257 Fed. 294;

and that in the absence of independent proof of the *corpus delicti* extrajudicial statement or confession of a defendant is incompetent and inadmissible for any purpose.

Wynkoop v. United States, 22 Fed. (2d) 799;

Mangum v. United States, 289 Fed. 213;

Daeche v. United States, 250 Fed. 566;

Flower v. United States, 116 Fed. 241.

In dealing with the insufficiency of the evidence to establish the offenses set forth in counts 2 and 3 of the indictment, we have already demonstrated that the *corpus delicti* of neither one or the other of the offenses charged had been established. To avoid repetition we refer this Court back to our arguments on the insufficiency of the evidence.

As the *corpus delicti* of neither offense was established by evidence independent of Chevillard's signed statement, the court erred in admitting the same in evidence. The improper admission of this statement, damaging as it must have been to Chevillard, requires a reversal of the convictions as to him.

8. THE COURT ERRED IN REFUSING TO STRIKE OUT THE SIGNED STATEMENT OF DEFENDANT CHEVILLARD (Assignment of Error No. 14, Tr. 62).

“That the court erred in refusing to strike out Government's Exhibit No. 18, the statement signed by the defendant Chevillard, which said motion was made upon the ground that the manner in which the

statement was procured was denial of due process of law and violation of the Fifth Amendment to the Constitution of the United States, which motion was denied by the court and to which the defendant Chevillard duly noted an exception. (Exception No. 21)''

At the conclusion of the Government's case in chief, counsel for appellant Chevillard moved to strike out the statement of Fernand Chevillard taken by the F.B.I. on the following grounds, among others, to-wit:

“First, I move to strike it out on the ground that the manner in which the statement was procured was denial of due process of law and violation of the Fifth Amendment of the Constitution of the United States. Your Honor will recall that there is a series of decisions rendered in the last couple of years which deal with the taking of statements, admissions and confessions from a defendant, and without enumerating them in detail your Honor knows that they condemn the use of anything that approaches coercion, that amounts to duress in its procurement. You heard the testimony of the FBI agent who testified as to the manner in which this statement was procured * * *” (Tr. 200.)

Thus, the trial court was fully advised that appellant Chevillard was invoking the Due Process of Law Clause of the Constitution and claiming that the statement was not free and voluntary.

The authorities are uniform to the effect that a confession of accused is inadmissible unless it is the free and voluntary act of the defendant.

The use of a confession obtained by duress or coercion is a denial of due process of law as guaranteed by the

Constitution. (*Brown v. Mississippi*, 297 U.S. 278; 80 L.ed. 682.)

The Supreme Court of the United States, on many occasions, has held that the test of whether due process has been denied in a Federal Court is not confined to a mere inquiry of whether threats had been made or violence used upon the person confessing; but rather that the true test is whether a consideration of all the surrounding circumstances, including the manner and conditions under which the accused was questioned, and the place where questioned and the length of time consumed in the questioning, resulted in depriving the accused of mental freedom. If such was the result, due process of law had been violated and the statement and confession is inadmissible for any purpose.

Ashcraft v. Tennessee, 322 U.S. 143, 154, 88 L.ed. 1192, 1199.

Also the Court has repeatedly held that in determining the validity of convictions based on confessions, the court is not confined to the due process clause:

“ the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as ‘due process of law’ and below which we reach what is really trial by force.”

McNabb v. United States, 318 U. S. 332, 340; 87 L. ed. 918, 824;

United States v. Mitchell, 322 U. S. 65, 88 L. ed. 1140.

The circumstances in which the confession was taken appears in the cross-examination of Roland A. Wilson, a special agent for the FBI (Tr. pp. 172 to 181), and may be summarized as follows:

The statement was taken between the hours of 2:30 and five o'clock of the morning of January 24. Chevillard was taken into custody at about 1:10 at the Normandie Restaurant and was removed from there immediately to the San Francisco Field Office of the Federal Bureau of Investigation where he was kept until 5:30 in the morning. (Tr. p. 172.) The statement was signed about five o'clock in the morning. Wilson did most of the questioning of Chevillard. (Tr. p. 172.) "I questioned him and then we would decide on how he wanted to say each thing and that was put into the statement. I would question him and he would answer and sometime his answer was not in a form that would go down and we would have to straighten it out." (Tr. p. 173.) There was no stenographer or a machine to preserve a record of what was actually said or done. (Tr. p. 173.) Sometimes Chevillard's answers were not responsive to the question and we would have to question him several times before we got a responsive answer. At other times we thought his answers were immaterial to the questions that had been asked. (Tr. p. 173.) There were questions that were asked and do not appear. Also answers given that do not appear in the statement. He gave several explanations when we were asking him about things pertaining to Barral and to the meat. It took from about 1:30 until five a. m. to acquire the information that appears in this document. It took approximately 3½ hours. (Tr. p. 173.) Chevillard did not tell us that he un-

derstood he had the right to have a lawyer. He was told that. He did not use the words that he was willing to make a free and voluntary statement. (Tr. p. 173.) We usually include that in the statement. (Tr. p. 174.) The statement was not being written during the whole 3½ hours. We started to write the statement when we thought that Mr. Chevillard was giving us the information that was true. He would give us information that I did not think was true. It consisted mostly of denials on his part. (Tr. p. 174.) He denied that there had been any agreement between himself and Barral. (Tr. p. 174.) He made all these denials for about an hour, that is up to somewhere around half past two. "To a certain extent the words used in this written statement are the words used by Mr. Chevillard." (Tr. p. 175.) "This statement really is edited. It was put in a form so that it will read. It purports to be the substance and not the words of what Mr. Chevillard told me." (Tr. p. 175.) As to the language in the statement reading, "this agreement to try and sell the meat", etc., Mr. Chevillard agreed to that statement in that form. There was some talk about it. Chevillard said he did not like the word "agreement". There was some discussion about the word "agreement" and it was finally agreed by Mr. Chevillard that it was an agreement. We asked him questions to try and determine if this was not an agreement. At first Chevillard did not want the word "agreement" used. Afterwards we agreed that it was an agreement. When Chevillard was taken into custody I told him he was being placed under arrest in connection with a truckload of meat taken by Barral from the Heuck Company. I don't believe I told him anything else rela-

tive to the nature of the charge against him. We did not tell him who he was supposed to have conspired with. (Tr. p. 177.)

No notes were taken. Chevillard did not tell us that Vincenzini was a butcher who lived at 540 San Antonio, Lomita Park, California. We looked up the exact address in a telephone directory and asked him if that was the fellow. (Tr. p. 178.) The reason I didn't put certain things in the statement is, it is not supposed to be a word for word question and answer statement, that is the substance of the conversation that took place." (Tr. p. 179.) We did not discuss with Chevillard what should be left out of the statement of the things he told me in those 3½ or four hours. (Tr. p. 180.) The words in the statement "the receipt was turned over to me by Special Agent Wilson and Fallaw on January 24, 1945," was not a statement made by Mr. Chevillard. After Chevillard signed the statement he was taken to the City Prison and booked around 5:30 or six o'clock in the morning.

From the foregoing it is apparent that the statement not only was not a free and voluntary statement given on the part of Mr. Chevillard, but it was not even Chevillard's statement. Chevillard was arrested about 1:10 in the morning. He was not taken before a magistrate but taken to the Field Office of the FBI where he was kept for a period of about four hours. The questioning and statements of Chevillard that occurred during the first hour and a half were never included in the statement. **The only things put in the statement were those things which the FBI agent thought were true. In other words those things which the FBI agent felt would incriminate Chevillard. Even these things were not written in the man-**

ner told by Chevillard. Constant arguments occurred whereby the FBI agent or agents tried to convince Chevillard that a certain particular wording should be used in describing the events and it was only after such argument and after the repeated protests of Chevillard that the statement was signed in the form it was written. Chevillard was alone with the FBI agents. No attorney or friend was present. When the FBI agent was satisfied that he had argued and cajoled Chevillard into agreeing to the language used, **then the statement was satisfactory to the FBI agent.** Chevillard after four hours of grilling signed the statement, then and only then was Chevillard taken to jail and booked. This as the witness Wilson testified was done when "I was satisfied." (Tr. p. 181.) Even then Chevillard was not taken before a commissioner.

Under every rule and decision of the Supreme Court and of this court the foregoing facts made it the duty of the trial court to exclude the written confession.

We will not burden the court with voluminous citations from the recent decisions on this point but we do contend that the trial court should have excluded the confession and not having done so this court should reverse the judgment of Chevillard under authority of the following cases:

McNabb v. United States, supra;

Mitchell v. United States, supra;

Ashcraft v. Tennessee, supra;

Gros v. United States (C.C.A. 9) 136 Fed. (2d) 878;

Runnels v. United States, (C.C.A. 9) 138, Fed. (2d) 346.

The whole questioning of Chevillard commenced with a violation of his rights. Under the case of *McNabb v.*

United States, supra, and *Runnels v. United States*, supra, it is held that an arresting officer, including agents of the Federal Bureau of Investigation, must take the person arrested immediately before a committing officer. Such was not done in the case of Chevillard. This provision of the law requiring an arrested person to be taken before a magistrate or commissioner is to prevent the procuring of confessions in the manner resorted to in this case, and has been stated by our Supreme Court in the case of *McNabb v. United States*, supra, as follows:

“The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible prac-

tices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection."

In *United States v. Mitchell*, 322 U.S. 65, 64 S.Ct. 896, 88 L.ed., 1140, Justice Reed in a concurring opinion says:

"As I understand *McNabb v. United States*, 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608, as explained by the Court's opinion of today, the McNabb rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. **Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion.**"

In addition to the testimony of the FBI agent let us add the testimony given by appellant Chevillard as to how the statement was taken. This testimony appears in the transcript at pages 243 to 247 and is correctly summarized as follows:

I was arrested at the door of my restaurant by five men who said to me 'FBI' or 'Federal Bureau of Investigation.' (Tr. p. 243.) They grabbed me by the arm and **put the handcuffs on** and felt through my pockets. None of these agents told me his name. They took me to the FBI headquarters where I was a little over four hours during which they were questioning me on every side. First, two men questioned me and

then there was another one, and another would go out and another one come. Sometimes there were four men and a man from outside would come inside and open a door and say, 'Are you co-operating?' Then he would go out and a man in front of me would start again and another would put me another question and, 'I was arguing all the time and I was kind of lost.' I signed the statement. I did not know the two agents who have been identified in this trial as Wilson and Fallaw. When they took me to the Field Office no one told me I had a right to have a lawyer. I asked to have a lawyer and they said yes. I said I would like to use a phone and the other agent said, 'Why don't you make a statement?' They told me I could use the phone but did not show me where the phone was. Nobody asked me whether any promises or inducements were made to me. I did not make the statement as it appears in the writing. I didn't want to sign the statement because of the paragraph that says, 'This agreement to try to sell the meat,' etc., because I fought for the word. For twenty minutes or a half hour we argued that there was never no agreement and I tried to point it out to them. It was wrong. Then the witness testified as to how the agents argued with him, that what he said he did was in fact an agreement. (Tr. p. 246.)

They didn't write anything for a long time during which they were telling me all kinds of things which I was denying. I would tell them that I couldn't tell them something when I didn't do it. I signed the statement because I told them, 'I am all in and I don't care what was put in there.' I started to argue with them about the fact that I was not going to get any money out of it. They told me I was going to get something out of it. Finally I said, 'All right, give me this and I will sign it.'

It should be noted that the Government did not cross-examine Chevillard as to the manner in which the confession was taken from him. Neither did they recall any of the FBI agents to refute Chevillard's testimony.

It may be argued that the testimony of Chevillard should not be considered in determining the error of the court in refusing to strike out this confession for the reason that Chevillard's testimony came in after the motion to strike was made. However, this court has held in *Gros v. United States*, 136 Fed. (2d) 878, that **where a conviction is based upon a confession illegally obtained, the court "in a matter so absolutely vital to defendants" will sua sponte notice and determine such fact.**

We submit that this confession was procured in a manner condemned by every decision of our Federal Courts and necessitates a reversal of the conviction of Chevillard.

10. THE COURT ERRED IN ITS INSTRUCTIONS AS TO WHO IS AN AIDER AND ABETTOR IN THE COMMISSION OF CRIME (Assignment of Error No. 18, Tr. 65).

That the court erred in instructing the jury as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or whoever aids, abets, counsels, induces or procures its commission, is a principal and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of the law is a principal, as is also one who either aids, abets, counsels, induces, or procures the doing of that act.

"The word 'aid' means to help, to support, or to assist.

"The word 'abet' means to instigate or encourage by aid or countenance, or to contribute.

“It is essential to the guilt of a person charged with aiding and abetting the commission of the crime that such person’s acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

“A person who knowingly renders assistance, co-operation, and encouragement in the commission of an offense is one who aids and abets in the commission.”

Each defendant objected and noted an exception to the giving of the foregoing portion of the charge upon the ground that it did not contain the element that the person accused of aiding and abetting another in the commission of a crime, must have a criminal intent and that such act of aiding and abetting must be done with the intent of having the ultimate act actually done and accomplished. (Exception No. 31.)

The instruction as given omits the essential element of the law of vice principal, which is that:

“For one to be guilty as principal in the second degree, or an aider and abettor, it is essential that he share in the **criminal intent** of the principal in the first degree; the same criminal intent must exist in the minds of both.”

26 *C. J. S.* 155, cases cited in the footnote.

“In order that a person may be convicted as an aider of a felony, he must have rendered assistance with the knowledge of the felonious intention of the principal in the crime and must have aided with such intent.”

Mitchell v. Commonwealth, 225 Ky. 83, 7 S.W. 2d, 823.

In the case at bar it was of the very highest importance to these appellants that the Court in charging the jury as to the law of principals in the second degree should have given a correct charge. We have heretofore contended that there is no evidence that either Chevillard or Patron had any knowledge of the purported giving of the receipt for the full amount of the meat ordered from the Heuck Company by the United Fruit Company. No pretense was made that either of them was a principal in the first degree, and, before either of them could be held as an aider and abettor, it was necessary to prove to a moral certainty and beyond a reasonable doubt, that they shared the criminal intent of the perpetrator of the crime.

Here, the appellants never intended or contemplated that (1) any false claim should be filed with the W.S.A., or (2) that a receipt be presented to that agency for signing, or (3) that any false statement be made to that agency.

11. **THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 3 (Assignment of Error No. 20, Tr. 67).**

“That the court erred in refusing to give defendants' requested instruction No. 3, to which refusal each defendant duly excepted. Said instruction No. 3 reads as follows:

Requested Instruction No. 3

“Two of the defendants in this case, Pierre Barral and Lucien L. De Angury have taken the stand as witnesses in behalf of the Government. Each of these witnesses has pleaded guilty to the charges contained in the indictment. In considering the credibility to be given to each of these witnesses you have a right to take into consideration the fact that each of these men has pleaded guilty and is awaiting the pronounce-

ment of judgment. You have a right to consider these facts in determining the bias that each of these witnesses may have against their co-defendants and in determining whether or not these two men are testifying under the expectation of immunity or leniency as to the charges to which they have pleaded guilty. If you determine that either of these men are testifying in favor of the government due to any bias they may have against any other defendant in the case or under the expectation of any immunity or leniency, you have a right to consider such fact in determining the credibility of each such witness."

In discussing the obvious error of the Court's refusal to give this requested instruction, we need go no farther than to cite the cases relied upon in support of our contention that the Court committed error in curtailing the cross examination of the witness Barral. **This witness was an accomplice as a matter of law. By his own confession he was the prime mover and instigator of everything done by these appellants. He had pleaded guilty to the charge.** It was the duty of the Court to call the attention of the jury to these facts and to inform them that the criminal status of the witness, and any motive that he might have for testifying, were to be considered by them in their deliberations. It is a matter of common knowledge that criminals do not turn State's evidence without some promise or expectation of leniency or perhaps complete immunity. Chevillard and Patron had pleaded Not Guilty, thereby denying the charges against them and casting upon the Government the burden of proving every material allegation in the indictment to a moral certainty and beyond a reasonable doubt. Barral had pleaded Guilty and the presumption of his guilt was therefore conclusive.

It was the plain duty of the Court, in summing up the evidence, to direct the attention of the jury to those facts, in order that they might properly gauge the testimony of the witness.

12. THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION 37 (Assignment of Error No. 25, Tr. 72).

“That the court erred in refusing to give defendants' requested instruction No. 37, to which refusal each defendant duly excepted. Said requested instruction 37 reads as follows:

Requested Instruction No. 37

“When independent facts and circumstances are relied upon to establish by circumstantial evidence, the guilt of a defendant, each material, independent fact or circumstance in the chain of facts relied upon must each be established to a moral certainty and beyond a reasonable doubt. If in the chain in the facts of circumstantial evidence any one or more of the material facts in such chain are not established to a moral certainty and beyond a reasonable doubt, the entire proof fails and a verdict of not guilty must be returned.”

This instruction was a correct statement of the law. “Where circumstantial evidence consists of a number of connected and inter-dependent facts and circumstances, it is like a chain which is no stronger than its weakest link. If any link is missing or broken, the continuity of the chain is destroyed and its strength wholly false.”

Carr v. State, 28 Ala. App. 466, 187 So. 252-254;

United States v. Searcey, 26 Fed. 435;

State v. McKee, 17 Utah, 370, 53 Pac. 733.

State v. Austin, 129 N.C. 534, 40 S.E. 4;

Each essential fact must be distinctly and independently proved as if the whole issue rested upon it; to state the matter otherwise,—to a moral certainty and beyond a reasonable doubt.

State v. Dudley, 96 W. Va. 381, 123 S.E. 241;

Kassin v. United States, 87 Fed. 2d, 183.

The instruction submitted is one customarily given in all cases in which circumstantial evidence is relied upon in whole or in part and it has had the approval of the Courts ever since the leading case of *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

The court gave no comparable instruction to the jury. The proof of guilt of each appellant was sought to be established by a chain of facts and occurrences. The jury should have been instructed as to the degree of proof required to establish each such fact.

13. **THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION NO. 11** (Assignment of Error No. 21, Tr. 68).

“That the court erred in refusing to give defendants' requested instruction No. 11, to which refusal each defendant noted an exception, which requested instruction reads as follows:

Requested Instruction No. 11

‘By the second count of the indictment on file herein the defendants are charged with knowingly, wilfully, unlawfully and feloniously, covering up and concealing by a trick, scheme and device a material fact within the jurisdiction of the War Shipping Administration and that the material facts so covered and concealed by such trick and scheme and device are as follows: that the defendants knew that

the War Shipping Administration had ordered from the Ed Heuck Company approximately 64,793 pounds of meat, to be delivered by the said Ed Heuck Company to the said War Shipping Administration; that possessing such knowledge that defendants diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use and with the intent to defraud the said War Shipping Administration, the defendants covered up and concealed the fact of said diversion and conversion of approximately 17,832 pounds of meat by the trick, scheme and device of signing and causing to be signed and issuing and causing to be issued by the said War Shipping Administration a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

‘Before you can find either the defendant Chevillard or the defendant Patron guilty on this second count of the indictment you must be satisfied from the evidence to a moral certainty and beyond a reasonable doubt that such defendant did in fact sign or caused to be signed or issue or cause to be issued by the War Shipping Administration said receipt for approximately 64,793 pounds of meat. If the evidence established that the defendant Chevillard did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt, you must return a verdict finding the defendant Chevillard not guilty. If the evidence established that the defendant Patron did not sign or caused to be signed and was not instrumental in having the said War Shipping Administration issue or caused to be issued such receipt you must return a verdict finding the defendant Patron not guilty. If you have a reason-

able doubt as to whether the defendant Chevillard or the defendant Patron signed or caused to be signed or was instrumental in having the War Shipping Administration issue or cause to be issued such receipt, you must resolve such doubt in favor of such defendant and acquit him on the second count of the indictment.' "

The foregoing instruction would have informed the jury that they must, in order to justify a conviction on the second count, be convinced beyond a reasonable doubt that the appellants signed or caused to be signed the receipt mentioned in the indictment. Conversely it informed the jury that if there was a reasonable doubt as to whether appellants were instrumental in signing the receipt or causing it to be signed, or aided or abetted, counseled or advised its signing they must find each appellant not guilty.

Every defendant is entitled to have his theory of the case and his defense presented to the jury and to have instructions given consistent with such theory and defense:

Calderon v. United States, (C.C.A. 5) 279 Fed. 556, 558;

Hendry v. United States, (C.C.A. 6) 233 Fed. 5, 18;

Carney v. United States, (C.C.A. 8) 283 Fed. 398.

Here it was appellants' theory of defense that they had nothing to do with the receipt and did not even know that it was to be issued or signed by anyone. They were entitled to an explicit instruction on their theory of the case and defense.

No comparable instruction was given by the court. By refusing to give the foregoing instruction the court, in effect, refused to charge that the jury must acquit appellants if they proved their innocence.

CONCLUSION

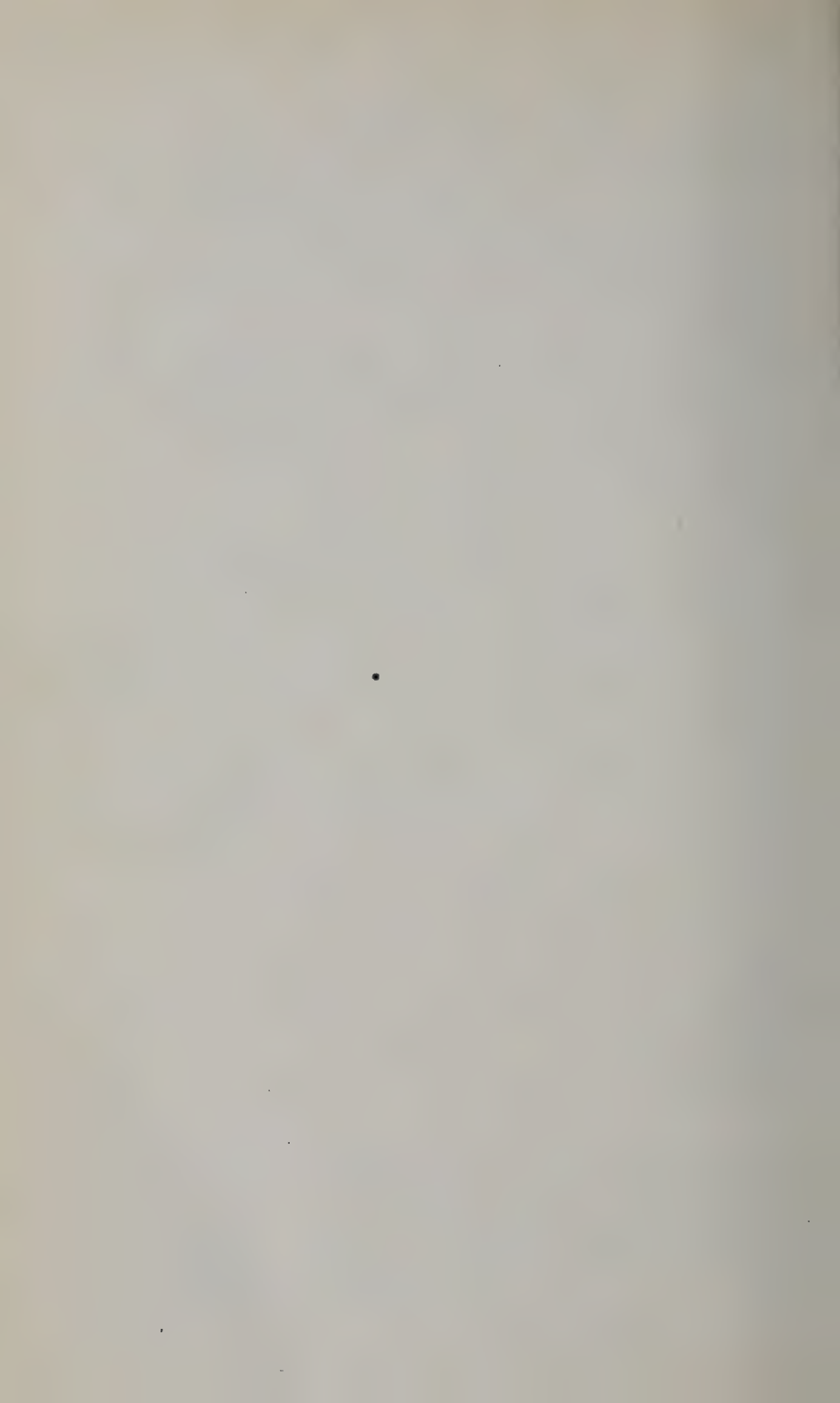
For the failure of the indictment to charge any crime known to the law, for the utter lack of evidence to justify a conviction, and for the manifest errors committed by the trial court, it is submitted that as to each of the appellants the judgment of conviction upon each count of the indictment should be reversed and the cause remanded to the lower court with directions to dismiss the indictment and to discharge each of the appellants therefrom.

Dated: November 26, 1945.

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Chevillard and Patron.



No. 11018

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

FERNAND CHEVILLARD AND GEORGE PATRON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

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PAUL P. O'BRIEN,
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SUBJECT INDEX

	Page
Jurisdictional statement.....	1
Statement of the case.....	2
Summary of the evidence.....	3
Argument:	
1. The District Court was correct in overruling the demurrers to the indictment.....	11
2. The evidence was sufficient to establish appellants' participation in the offense charged in Count Two.....	16
3. The evidence was sufficient to establish the existence of the conspiracy charged in Count Three and the appellants' participation therein.....	20
4. The Court did not err in refusing to direct the witness Hinman to produce the books of the Ed. Heuck Company, or in limiting the cross-examination of the witness Dean Heuck.....	24
5. The Court did not err in limiting the cross-examination of the witness Barral.....	26
6. The Court was correct in admitting the signed statement of appellant Chevillard.....	28
7. The Court was correct in refusing to strike the statement obtained from appellant Chevillard.....	29
8. The Court correctly instructed the jury as to the criminal intent necessary to convict appellants.....	38
9. There was no error in the failure to give specific instructions as to the possible bias of Barral and De Angury who had pleaded guilty.....	40
10. The Court was correct in its instruction with respect to circumstantial evidence.....	42
11. The refusal to give appellants' requested Instruction Number Eleven did not constitute error.....	44
Conclusion.....	45
Appendix A.....	46
Appendix B.....	47
Appendix C.....	52

TABLE OF AUTHORITIES CITED

Cases:

<i>Alpin v. United States</i> , 41 F. (2d) 495.....	25
<i>Alford v. United States</i> , 282 U. S. 687.....	28
<i>Ashcraft v. Tennessee</i> , 322 U. S. 143.....	37
<i>Becher v. United States</i> , 5 F. (2d) 45 certiorari denied 267 U. S. 602.....	14
<i>Berger v. United States</i> , 295 U. S. 78.....	24
<i>Blitz v. United States</i> , 153 U. S. 308.....	28
<i>Borgia v. United States</i> , 78 F. (2d) 550, certiorari denied 296 U. S. 615.....	19
<i>Caminetti v. United States</i> , 242 U. S. 470.....	41

Cases—Continued.

	Page
<i>Clemons v. United States</i> , 137 F. (2d) 302.....	12
<i>Coffin v. United States</i> , 162 U. S. 664.....	40
<i>Collins v. United States</i> , 20 F. (2d) 574.....	19
<i>Collins v. United States</i> , 65 F. (2d) 545.....	19
<i>Corbett v. United States</i> , 89 F. (2d) 124.....	23
<i>Cossack v. United States</i> , 82 F. (2d) 214 certiorari denied 298 U. S. 654.....	41
<i>Craig v. United States</i> , 81 F. (2d) 816, certiorari denied 298 U. S. 690.....	16
<i>Farkas v. United States</i> , 2 F. (2d) 644.....	28
<i>Gros v. United States</i> , 136 F. (2d) 878.....	37
<i>Hagner v. United States</i> , 285 U. S. 427.....	13
<i>Hopper v. United States</i> , 142 F. (2d) 181.....	13, 14
<i>Houghton v. Jones</i> , 68 U. S. 702.....	25
<i>Madden v. United States</i> , 20 F. (2d) 289, certiorari denied sub nom <i>Parente v. United States</i> , 275 U. S. 554.....	25
<i>McGunnigal v. United States</i> , 151 F. (2d) 162, certiorari denied No. 549, Oct. Term, 1945, Supreme Court.....	20, 24, 45
<i>McNabb v. United States</i> , 318 U. S. 332.....	29, 32, 33
<i>Outlaw v. United States</i> , 81 F. (2d) 805 certiorari denied 298 U. S. 665.....	41
<i>Paddy v. United States</i> , 143 F. (2d) 847, certiorari denied 324 U. S. 855.....	37
<i>Pine v. United States</i> , 135 F. (2d) 353 certiorari denied 320 U. S. 740.....	42
<i>Runnels v. United States</i> , 138 F. (2d) 346.....	37
<i>Shepard v. United States</i> , 236 F. 73.....	42, 43, 44
<i>Smith v. United States</i> , 61 F. (2d) 681, certiorari denied 288 U. S. 608.....	23
<i>United States v. Behrman</i> , 258 U. S. 280.....	13
<i>United States v. Cohn</i> , 270 U. S. 339.....	15
<i>United States v. French</i> , 57 Fed. 382.....	14
<i>United States v. Gilliland</i> , 312 U. S. 86.....	16
<i>United States v. J. Greenbaum & Sons</i> , 123 F. (2d) 770.....	38, 39
<i>United States v. Grunberg</i> , 131 Fed. 137.....	14
<i>United States v. Heinze</i> , 161 Fed. 425, reversed 218 U. S. 532.....	14
<i>United States v. Keegan</i> , 141 F. (2d) 248, reversed 325 U. S. 478.....	34
→ <i>United States v. Mitchell</i> , 322 U. S. 65.....	33, 35, 36
<i>United States v. Polakoff</i> , 112 F. (2d) 888, certiorari denied 311 U. S. 653.....	14
<i>United States v. Weisman</i> , 83 F. (2d) 470, certiorari denied 299 U. S. 560.....	23
<i>United States v. Winslow</i> , 195 Fed. 578, affirmed 227 U. S. 202.....	14
<i>Webster v. United States</i> , 59 F. (2d) 583, certiorari denied 287 U. S. 629.....	12
Statutes:	
18 U. S. C., Section 80.....	46
18 U. S. C., Section 88.....	46

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11018

FERNAND CHEVILLARD AND GEORGE PATRON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

(a) The United States District Court for the Northern District of California had jurisdiction of the appellants and the subject matter as to Count II of the indictment under Section 80, United States Code, Title 18, defining the crime of presenting false claims and making false statements in matters within the jurisdiction of a department or agency of the United States; and had jurisdiction of the appellants and the subject matter as to Count III of the indictment under Section 88, United States Code, Title 18, defining the crime of conspiracy.

(b) The indictment alleges in Count II that at San Francisco, California, the appellants concealed and covered up by trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration and Count III charges the defendants con-

spired to commit offenses against the United States by violating Section 80, United States Code, Title 18.

(c) This court has jurisdiction of the appeal under the provisions of Section 225 (a) and (d), United States Code, Title 28.

STATEMENT OF CASE

Appellants were indicted on three counts, the first two charging violations of 18 U. S. C. Section 80 and the third charging conspiracy. They were acquitted of the offense alleged in the first count and convicted of the offenses charged in the second and third counts. This is an appeal from the judgment of the court sentencing each of them to be imprisoned for two years in a Federal Penitentiary on each count, the sentences to run consecutively (R. 33-37). The facts presenting the questions involved are more fully set out below in the summary of the evidence.

SUMMARY OF THE EVIDENCE

Appellants were the proprietors of a restaurant in San Francisco (R. 225, 234). They were indicted together with Julio Rodriguez, Pierre Barral, Clarence Jacky, Lucien DeAngury, and Angelo Vincenzini for violations of the false claims statute, 18 U. S. C. Section 80, and for conspiracy. The indictment contained three counts, the first count alleging that the defendants caused false statements and representations as to the amount of meat delivered to the War Shipping Administration to be made in a matter within the jurisdiction of the War Shipping Administration, the second count alleging that the defendants concealed and covered up by trick, scheme, and

device a material fact within the jurisdiction of the War Shipping Administration, the fact being that 17,832 lbs. of meat had been diverted from a shipment to the War Shipping Administration, and the third count alleged the existence of a conspiracy to commit offenses against the United States, the offenses being violations of 18 U. S. C. Section 80 (R. 2-8). Barral and DeAngury pleaded guilty (R. 31, 32). Vincenzini and Jacky were found not guilty on direction of the court. Rodriguez was found guilty on all three counts and appellants were acquitted as to count 1 and found guilty on counts 2 and 3 (R. 25-27). The indictment is printed in appellants' brief, pp. 4-9, and in the appendix to this brief.

Rodriguez and Barral were respectively chief steward and assistant steward on the *Sea Perch*, a troop transport being operated by the United Fruit Company, an agent for the War Shipping Administration (R. 85-87). The War Shipping Administration, through the United Fruit Company, ordered a considerable quantity of meat from the Ed Heuck Company for the *Sea Perch* in January 1945 (R. 86-87). The purchase order was captioned "W. S. 18,841 United States of America, War Shipping Administration, United Fruit Company, General Agent" (R. 86-87). All purchase orders are to the account of the United States of America, War Shipping Administration, and all the invoices presented to the United Fruit Company are rendered to the United States of America, War Shipping Administration, United Fruit Company, General Agents (R. 85-86).

The *Sea Perch* arrived in San Francisco harbor December 28, 1944. Rodriguez told Barral that they had about 20,000 lbs. of meat left aboard ship and they discussed the possibility of disposing of that meat (R. 126). Rodriguez went to New York shortly after their arrival and returned January 13, 1945. Barral visited the Normandy Restaurant January 13, 1945, and talked to the appellants, telling them he might get some meat for them. Appellant Chevillard expressed a willingness to take the meat any time they were ready (R. 126-127). Barral had a previous acquaintance with appellants (R. 123), particularly with the appellant Patron, having once gone to sea with him (R. 123, 225). On January 16, 1945, George M. Kinelle, a chef, was at the Normandy Restaurant and appellant Chevillard told him he had some people who had some meat. Kinelle stated that he could find somebody to buy meat (R. 152). On January 23 Kinelle left an order for 15,000 lbs. of meat at 75¢ per lb. (R. 153, 157).

On January 16, Rodriguez and Barral went to the Ed Heuck Co. and talked to Elroy Hinman, the manager of the company, in his office (R. 89, 91-92, 127-128). Rodriguez and Barral told Hinman they had 18,000 or 20,000 lbs. of meat on the *Sea Perch* and wanted to make an arrangement whereby that much of the shipment by the Ed Heuck Co. to the *Sea Perch* could be diverted and disposed of to their mutual profit (R. 91, 145). Rodriguez offered to see that the company received receipts for delivery of the entire order (R. 91, 145). Hinman stated that all their deliveries to the ships were for the account

of the War Shipping Administration and that he could not dispose of the meat anywhere else. Barral explained that he had means whereby he could dispose of the meat not delivered to the ship (R. 92.) Hinman met Barral on January 17 at a grill near the Heuck Co.'s place of business and was told the name of the ship, that it would be loaded the following week and was requested to supply a list of everything the Ed Heuck Co. was to load on the ship (R. 92). That evening Barral told appellants that they could get the meat. Appellants said they were ready to take the meat any time it would be fixed, and appellant Chevillard said the price would be 45 or 30 cents a lb. (R. 129). At that time Barral told appellants, "We had 30,000 lbs. of meat they had left on board the ship and that nobody knew about it and that we could get one truck load from the meat company and send that meat to them" (R. 140).

Thereafter Hinman and Barral met and went to the Palace Hotel, where Hinman showed Barral the meat order (R. 129-130). Hinman called the company and obtained the list of the cuts and Barral wrote them down. Barral and Hinman discussed the obtaining of a truck driver and Hinman finally said there was no one he could trust. Barral asked appellants to procure a truck driver but they never did (R. 130).

On the 18th or 19th of January Barral told appellants at the Normandy Restaurant how he was going to get the meat and about the delivery tags. He told them they would get the meat "not from the ship but from the meat company, that we have

the meat on the ship, 20 or 25,000 lbs. of meat and that we got a truck that would go to their place." He told the appellants that the meat was a truck load which would go to their place instead of going to the ship and that the meat would be covered by what was on board. Appellants asked him if it was safe and Barral replied, "The bill will be signed by the ship's steward or the checker" (R. 130-131).

On January 20, Barral and Hinman met and Hinman told him it would be better for Hinman to place the loaded truck on Sansome St. right adjacent to the plant and let it sit there until Barral's own driver came to pick it up (R. 95). On January 22 the same two met and Hinman told Barral the delivery receipts for the entire order would be placed on the seat of the truck (R. 95-96, 131). The shipment to the *Sea Perch* was loaded on trucks on January 23. One of the trucks was loaded and parked on Sansome St. and had about 17,500 lbs. on it (R. 104-105). Some of the meat on the truck was packed in boxes, sacks, and cartons which were later found by the FBI agents at the Millbrae Dairy (R. 105).

On January 23 Barral telephoned Hinman who told him the truck was sitting out on Sansome St. and the receipts were on the seat (R. 96). At about 11:30 a. m. on January 23 Rodriguez told Barral to go to the truck and get the bill to be signed and that he, Rodriguez, or the checker would sign the bill. Barral went to San Francisco, obtained the receipt and took it back to the ship where he gave it to the checker, Brandt-Neilsen, who signed the delivery tag (R. 108, 110-111, 112, 131-132, 136-137).

Barral took the delivery receipt for the entire meat order, including the meat on the truck parked on Sansome St., back to Hinman and gave it to him that afternoon (R. 96, 132, 148). At that time the truck load of meat for the *Sea Perch* was still standing on Sansome Street (R. 96). The receipt returned to Hinman by Barral was the delivery tag from which the Ed Heuck Co. prepared its billing against the War Shipping Administration for delivery to its agents the United Fruit Co. for collection of Heuck Co.'s charges (R. 96).

The checker, Brandt-Neilsen, was checking stores to be loaded on the *Sea Perch* on January 23 and during that day received some meat from the Ed Heuck Co. (R. 108). He received the delivery tags for the Heuck meat from Barral, signed the receipt of the Ed Heuck Co. for the entire meat order and gave three copies back to Barral to give to the drivers, keeping five copies for the office (R. 108, 111, 112). The checker did not actually check the meat received from the Ed Heuck Co. and for which he had signed the receipt (R. 108, 110, 111, 112). The checker gave the five copies of the receipts to Henry Hamburg (R. 108).

Hamburg was chief checker and received receipted delivery tags from Brandt-Neilson on January 23 (R. 114). Among those tags were the delivery tags for the meat received from Ed Heuck Co. (R. 114). He prepared the papers for signature and took them to the chief steward, Rodriguez, who signed them at his request (R. 114, 115-116). Following the sig-

nature of himself and Rodriguez on the delivery tag Hamburg took the tag back to the accounting department of the United Fruit Co. (R. 114).

The shipping tag from the Ed Heuck Co. was received in the accounting department of the United Fruit Co. the next day (R. 117). The tag is used in support of an invoice and is used in the preparation of payment for the materials and supplies for which the tag calls (R. 117). The chief clerk in the accounting department held the tag until an invoice was received. He received from the Ed Heuck Co. an invoice calling for payment to them of 64,000 odd pounds of meat. The tag and accompanying invoice of the Ed Heuck Co. was sent to the New York office for payment. (R. 117-119). All bills for all supplies for the ships operated by the United Fruit Co. for the War Shipping Administration were paid by the New York office of the United Fruit Co. from a joint account which is established in accordance with the general agency agreement (R. 120).

After Barral gave the receipted delivery tag to Hinman, he went looking for a truck driver and found Lucien DeAngury (R. 132). Thereafter Barral went to the Normandy and told appellant Patron he had a truck driver. Patron took Barral and DeAngury to the latter's home, where he changed his clothes, and from there to the place where the truck was parked (R. 132, 141, 228). On January 22, appellant Chevillard had given Barral a map showing him how to get to Millbrae (R. 132, 142-149, 251), and on the 23rd he received a second map from Patron (R. 132-

133). DeAngury drove the truck and Barral sat beside him, Patron going ahead in his car (R. 133). On the way they had battery trouble with the truck, Patron coming back to help them (R. 133, 229). Patron went ahead and arrived at the Millbrae Dairy where he saw Jacky, whom he did not know, and told him he was from the Normandy Restaurant (R. 229). Appellant Chevillard was already at the dairy and both appellants went back along the road looking for the truck which they found having trouble with the lights (R. 230). Chevillard went back to the Dairy to tell Jacky the truck was on the way and Patron stayed to guide it in (R. 230). Chevillard had arranged for the storage of the meat at the Millbrae Dairy (R. 237-239, 240-241).

The truck arrived at the dairy and Barral, Jacky, DeAngury, and both appellants unloaded it (R. 133-134, 142, 231). Both appellants recognized the meat being unloaded from the truck as Government meat (R. 231, 232, 242, 243, 252). Both continued with the unloading after they recognized the meat as government meat (R. 231, 233, 242, 252) and Chevillard paid \$30 storage charges to Jacky, taking back a receipt to Barral (R. 142-143, 149, 171, 243, 252).

Barral testified on behalf of the Government. He stated that he was one of the defendants named in the case, that he had pleaded guilty and that he was awaiting the judgment of the court following his plea of guilty (R. 123). It was stipulated that Barral was in jail at the time of giving his testimony (R. 143). He also testified that he did not expect to get off easy because of what he was saying in

court and that he was willing to pay for what he did (R. 143). On recross-examination by appellants' attorney, Barral testified that he pleaded guilty in this case, that he did not know there were three charges in the indictment and that all he knew was that he was in court (R. 151). Thereafter he was asked if he knew how long he could be sent to jail, to which government counsel objected and was sustained (R. 151).

Appellant Chevillard gave special agents for the FBI a signed statement which was introduced in evidence (R. 167-169). The statement was obtained under the following circumstances. Chevillard was taken into custody at about 1:10 a. m. January 24 at the Normandy Restaurant and was immediately removed to the San Francisco Field Office of the FBI (R. 172). He was informed that he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company and that the charge against him would be conspiracy to defraud the Government (R. 177). Special Agents Wilson and Fallaw told Chevillard they would like to ask him some questions about this matter and told him that he had a right to have a lawyer (R. 173). The statement signed by Chevillard was not in his words but was written by one of the agents after questioning the witness. The agents would question Chevillard and then write it up (R. 173, 175). They discussed with Chevillard what should go in and what should be left out (R. 179-180). Chevillard was offered something to eat during the questioning

but refused, saying he had just finished his dinner when he was arrested. However, he did drink some milk (R. 181). Chevillard read the statement before he signed it (R. 181). No threats or promises had been made to him (R. 174). The statement was signed about 5:30 a. m. January 24 (R. 181). A copy of the statement is included herein as Appendix C.

The statement contained admissions by Chevillard that he knew Barral was a chef on ships (R. 168), that two or three months previous Barral had tried to sell him some meat off his ship (R. 168), that on January 18 or 19, 1945, Barral told appellants he was going to have about 15,000 lbs. of meat to sell, and that the meat was to be bought for his ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. before it was put on ship (R. 169), that Barral told appellants that the meat belonged to the Merchant Marine (R. 170) and that after the truck was unloaded he paid Jacky \$30 of his own money for storage (R. 171). It also contained other admissions, notably ones concerning making the arrangements for storage space, unloading the meat and the contacting of prospective purchasers (R. 169-172).

ARGUMENT

1. The District Court was correct in overruling the demurrers to the indictment

Appellants first contend that the second count of the indictment is fatally defective because certain words used in the statute were omitted. They argue that the second count charges the defendants con-

cealed and covered up a material fact within the jurisdiction of the War Shipping Administration whereas the statute proscribes the concealing and covering up of a material fact *in a matter* within the jurisdiction of a department or agency of the government. The omission of the words "in a matter" from the indictment, which followed the language of the statute, was undoubtedly an inadvertence, but such omission did not constitute a fatal defect. If the material fact covered up was within the jurisdiction of the War Shipping Administration it undoubtedly was in a matter within the jurisdiction of that agency. Furthermore, it is not necessary that an indictment follow the exact statutory language but only that the offense be substantially set forth and the essential elements charged. *Clemons v. United States*, 137 F. (2d) 302, 304 (C. C. A. 4); *Webster v. United States*, 59 F. (2d) 583, 586, (C. C. A. 8), certiorari denied 287 U. S. 629. The allegations in count two that the War Shipping Administration had ordered a certain quantity of meat from the Ed Heuck Co. and that the defendants sought to cover up the fact that they had diverted certain meat shipped pursuant to that order certainly alleges facts showing that the material fact covered up was in a matter within the jurisdiction of the War Shipping Administration.

Appellants' second contention is that no offense could be committed in the manner alleged in count two. Appellants argue the count is defective because it alleges the material fact was concealed by means of a receipt signed and issued by the War Shipping Administration itself and that there is no allegation con-

necting the defendants to the receipt. A careful reading of the second count reveals that the trick was the "signing and *causing* to be signed and issuing and *causing* to be issued" the receipt by the War Shipping Administration for the full amount of the meat ordered. How the defendants caused such a receipt to be signed and issued by the War Shipping Administration was a matter of evidence. The second count charges in effect that the defendants diverted certain meat from a shipment from the Ed Heuck Co. to the War Shipping Administration and converted the meat so diverted to their own use, and that this diversion was concealed and covered up by causing the War Shipping Administration to issue to the Ed Heuck Co. a receipt for the full amount of the shipment. This certainly alleges an offense under the statute. It is well settled that the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain but whether it contains the elements of the offense and apprizes the defendant of what he must be prepared to meet. *Hopper v. United States*, 142 F. (2d) 181, 184-186 (C. C. A. 9); *Hagner v. United States*, 285 U. S. 427, 431; *United States v. Behrman*, 258 U. S. 280, 288. Here the indictment contains all the elements of the offense, it charging that meat destined to the War Shipping Administration had been diverted and that the diversion was covered up by causing the issuance of a receipt for the full amount of the meat by the War Shipping Administration to the meat company.

If the defendants believed they were entitled to be apprized of any additional facts in order to prepare

their defense they should have requested a bill of particulars. See *United States v. Polakoff*, 112 F. (2d) 888, 890 (C. C. A. 2) certiorari denied 311 U. S. 653, quoted with approval by this court in *Hopper v. United States*, 142 F. (2d) 181, 185.

Appellants strongly urge that count two of the indictment is further defective in that it fails to set out in haec verba the receipt referred to therein. The rule for which appellants contend is limited to indictments for forgery, counterfeiting or certain types of misuse of the mails, *Becher v. United States*, 5 F. (2d) 45, 49 (C. C. A. 2), certiorari denied 267 U. S. 602; *United States v. French*, 57 Fed. 382 (D. Mass.) The instrument need not be set out according to its tenor or according to its substance unless it touches the very pith of the crime itself as in forging or counterfeiting. *United States v. Heinze*, 161 Fed. 425, 427-428 (S. D. N. Y.), reversed on other grounds 218 U. S. 532; *United States v. Grunberg*, 131 Fed. 137 (D. Mass.). The receipt referred to in count two of the indictment is not, as in counterfeiting or forgery, the subject matter of the litigation and therefore need not have been set out in haec verba in the indictment. Cf. *United States v. Winslow*, 195 Fed. 578, 582, (D. Mass.), affirmed 227 U. S. 202.

Appellants argue that the third count of the indictment charging conspiracy to commit offenses against the United States by violating Title 18, U. S. C., Section 80 does not state an offense. Count three alleges that the defendants conspired to violate the provisions of Title 18, U. S. C., Section 80, in three

ways: (1) by agreeing to cause the Ed Heuck Co. to present a claim, false in part, to the War Shipping Administration for payment for more meat than was actually delivered; (2) by making and causing to be made false statements in a matter within the jurisdiction of the War Shipping Administration to the effect that the War Shipping Administration had received more meat than was actually received, and (3) by concealing and covering up by trick, scheme and device a material fact in a matter within the jurisdiction of the War Shipping Administration.

Appellants argue that as to (1) it was not alleged that the claim to be presented was for the payment of money and that to constitute a violation of Title 18, U. S. C., Section 80, there must be a claim for the payment of money or property. Even assuming *arguendo* that it is necessary, as appellants contend, that the claim must be for the payment of money or property, it is apparent from an examination of the third count that such an allegation is contained therein. Count three alleges in part:

and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for payment from said War Shipping Administration for a total amount of approximately 64,793 pounds of meat. * * *

While there is no allegation as to amount or that the payment was to be made in money the foregoing certainly alleged that the claim was for *payment* for a certain amount of meat. Furthermore, the holding in *United States v. Cohn*, 270 U. S. 339, 345, cited

by appellants for the proposition that the statute relates only to the presentation of a claim for money, is no longer of any force. In *United States v. Gilliland*, 312 U. S. 86, 93, the Supreme Court directly held that the 1934 amendment to sec. 80 eliminated the necessity of showing pecuniary loss to the government.

Appellants contend that the third allegation of this count relating to the concealing of a material fact by causing a receipt to be issued by the War Shipping Administration is bad for the same reasons discussed with respect to the second count. Our arguments heretofore set forth in answer to their contentions as to the second count are equally applicable here.

While the allegations as to the offenses which the defendants conspired to commit may not have been stated as fully as in the substantive counts, it is well settled that in conspiracy indictments the offense which it is charged the defendants conspired to commit need not be stated with that particularity which would be required in an indictment charging the offense itself. *Craig v. United States*, 81 F. (2d) 816, 821 (C. C. A. 9), certiorari denied 298 U. S. 690.

2. The evidence was sufficient to establish appellants' participation in the offense charged in Count Two

The second count of the indictment alleges, in substance, that the War Shipping Administration had ordered a quantity of meat from the Ed Heuck Co., that certain meat was to be diverted from the shipment by the Heuck Co. to the War Shipping Ad-

ministration by the defendants and converted to their own use with intent to defraud the War Shipping Administration. Such diversion was to be concealed and covered up by the device of causing a receipt for the full amount of the meat shipment to be signed and issued by the War Shipping Administration to the Ed Heuck Company.

Appellants argue that the evidence shows them only to be receivers of the stolen meat and does not connect them with the issuance of the false receipt or show knowledge on their part that the meat belonged to other than the meat company. Such contentions ignore the true fact that this was an enterprise upon which appellants embarked knowing it to be illegal and after having been informed as to the general scope of the scheme.

Appellants were previously acquainted with Barral and knew he was a chef or steward on a ship (R. 123, 225,). Barral had talked to them about the meat nearly every night (R. 140). They knew the meat they were to get was intended for delivery to Barral's ship (R. 140), and that the diverted meat would be covered up by meat already on board and not reported by the stewards (R. 140). Chevillard admitted that he and Patron had been told by Barral that the meat belonged to the Merchant Marine (R. 170).

Moreover, appellants had been informed by Barral as to the manner in which the meat would be obtained. Barral testified that:

I told Chevillard and Patron how I was going to get the meat, and about the delivery tags, in the Normandie Restaurant on the 18th

or 19th of January. I told them that we would get the meat "not from the ship but from the meat company, that we had the meat on the ship, twenty or twenty-five thousand pounds of meat, and that we got a truck that would go to their place." I told them that the meat would be coming from the meat company. I said that the meat was a truckload, instead of going on board the ship it would go to their place, the meat was covered by what was on board, supposed to be left over. They asked me if it was safe. I says "The bill will be signed by the ship's steward or checker." They said to let them know when we would be ready to deliver the meat (R. 130-131).

What could be a plainer exposition of the fraudulent scheme? Appellants were told how the plan was to be worked. The meat was to be diverted from the delivery to the ship and the shortage covered by meat presently on board. The loss would be further concealed by procuring a fraudulent signing of the bill. Appellants were told about the delivery tags. Knowing these facts from the mouth of their partner, they assisted in carrying out the scheme. True, they had no hand in the procuring of the fraudulent delivery tag receipt. That was not their role. But they were eager participants in the entire enterprise and did their share. They located a storage place for the meat, assisted in removing the truck loaded with meat from Sansome Street to the Millbrae Dairy, helped unload it and Chevillard made a payment on the storage costs. This was a part of the offense charged in the second count since the diversion of

the meat was the central part of the enterprise and the fact which they were all interested in concealing.

Appellants certainly aided and assisted in the diversion of the meat and, having undertaken to promote the success of the enterprise, it was not necessary that they be present when the diversion of the meat was concealed and covered up through procuring the signing of the delivery tag receipts and transmitting them to the meat company, nor was it necessary that they be aware of the details of that part of the scheme. *Borgia v. United States*, 78 F. (2d) 550, 555 (C. C. A. 9), certiorari denied 296 U. S. 615; *Collins v. United States*, 20 F. (2d) 574 (C. C. A. 8). The act of appellants in assisting in the removal of the meat, unloading and storing it, as well as their attempt to find a purchaser, made possible the offense charged in count two and tended to cause its commission. Accordingly, they are liable as principals. *Collins v. United States*, 65 F. (2d) 545 (C. C. A. 5).

Appellants also contend that there has been no proof that they knew the meat belonged to the War Shipping Administration. Such protestations of lack of knowledge are not convincing. Their partners in the criminal enterprise, Rodriguez and Barral, by reason of their positions as stewards on the troop transport, and by reason of their handling of the delivery tags (govt.'s exhibits 5 and 9, R. 205-207), which on their face showed the meat to be consigned to the War Shipping Administration, knew that the meat was part of an order from the War Shipping Administration and would be paid for by that agency.

Certainly appellants should be chargeable with the knowledge of their partners.

In addition, appellants' knowledge that the meat which they assisted in removing was destined for Barral's ship, coupled with the knowledge that the government was waging bitterly contested wars across two oceans, create a logical inference that they were aware or at least had reason strongly to suspect that the government or one of its agencies was the purchaser of the meat and would ultimately pay for it. Compare *McGunnigal v. United States*, 151 F. (2d) 162 (C. C. A. 1), cert. den. No. 549, October Term, 1945, Supreme Court.

Finally, appellants admitted that upon unloading the meat at the Millbrae Dairy they saw that it was government meat (R. 231, 232, 242, 243, 252). Nevertheless, both continued as participants in the illegal transaction by continuing with the unloading and storing of the meat. In addition, Chevillard admittedly paid \$30 storage charges. Both returned to the Normandy Restaurant without having withdrawn from the enterprise. Thus by their own admissions, appellants had knowledge of the character of the meat during their participation in the illegal enterprise and prior to their arrest.

Under such circumstances appellants were guilty participants in the offense charged in count two.

3. The evidence was sufficient to establish the existence of the conspiracy charged in Count Three and the appellants' participation therein

The third count alleged that the defendants conspired to commit offenses against the United States.

The offenses were alleged to be violations of Title 18, U. S. C. A., Section 80. The manner in which those offenses were to be committed was; (1) by causing the Ed Heuck Company to present a claim false in part, to the War Shipping Administration; (2) by causing false statements and representations to be made in a matter within the jurisdiction of the War Shipping Administration; and (3) by concealing and covering up, by means of a false receipt, the material fact that a portion of the meat order had been diverted, in a matter within the jurisdiction of the War Shipping Administration.

Appellants argue that none of the conspirators ever discussed the presenting of a false claim by the meat company to the War Shipping Administration. This completely misses the point that the indictment alleges the offense was to be committed by *causing* the presentation of a false claim. It has been previously demonstrated that Rodriguez and Barral, by reason of their employment as stewards, knew the meat to be supplied by Ed Heuck Co. was for the War Shipping Administration (*supra*, pp. 3-7). While there was no testimony of direct statements among the conspirators with reference to the presentation of a false claim by the meat company, such an understanding was implicit in their dealings. Rodriguez and Barral sought the cooperation of Hinman, the meat company manager, in diverting the meat ordered for the *Sea Perch*. In their initial conversation with Hinman, Rodriguez, and Barral stated that they had more beef on board than was reflected in their inventory and that up to 25,000 lbs. of beef could be

diverted to some other use. Rodriguez stated that he was willing to see that the meat company received receipts for the delivery of the entire order but that up to 25,000 lbs. should not be delivered to the ship and that the amount withheld be disposed of to the mutual profit of Hinman, Barral, and himself. Hinman advised him that all the deliveries of the meat company were for the account of the War Shipping Administration, United States Government, and that it would not be practicable to divert the meat. When Hinman said he had no way of disposing of the meat Barral explained that he had a means of disposing of it (R. 91-92).

It is apparent from the foregoing that from the very beginning the conspirators contemplated that the meat company would obtain payment for the entire order despite the fact that some meat had been diverted. The procurement of a receipt for the delivery of the *entire* order was stressed by the stewards and they proposed a division of the proceeds from the sale of the meat diverted. Certainly the latter presupposes that the company would obtain full payment from the War Shipping Administration. The conspirators must have understood that the procuring of a receipt for the complete meat order would result in the meat company rendering a bill or claim to the government agency for the sale price of the meat, otherwise they would not have suggested the division of the proceeds from the sale among themselves and Hinman.

Appellants, being businessmen and being aware that the plan involved procuring for the meat company

a receipt for the entire meat shipment, could not but have understood that the ultimate result would be an attempt by the meat company to collect the value of the meat shown on the receipt from the government. Accordingly, the appellants conspired to do an act which would naturally and probably result in a false claim being presented to the government and may be held responsible for the consequences. *United States v. Weisman*, 83 F. (2d) 470 (C. C. A. 2), certiorari denied 299 U. S. 560; *Corbett v. United States*, 89 F. (2d) 124 (C. C. A. 8); *Smith v. United States*, 61 F. (2d) 681 (C. C. A. 5), certiorari denied 288 U. S. 608.

Appellants contend there is nothing in the evidence to show that they knew that any statement or representation was to be made to the War Shipping Administration. The same arguments as are made above are equally applicable here. Knowing that a false receipt was to be procured appellants had reason to believe false statements would be made.

It should not be forgotten that by their own admission appellants became aware of the fact that they were dealing with government meat at the time they were unloading it. Hence, knowledge, by their own admission, came to them during the course of the conspiracy. They continued with the enterprise despite such knowledge. Hence they must have been aware, during the time they were engaged in their unlawful conduct, that the government would be billed for the meat and that the procurement of the false receipts for the meat company must necessarily result

in a false statement in matters in which the government and one of its agencies was interested.

Lastly, appellants contend the evidence proves the existence of several conspiracies rather than a single conspiracy. Such is not the case; appellants were aware of the negotiations to persuade the meat company representative to divert the meat and accept the fraudulent receipt. They were in it from the start. Furthermore, there is no showing of substantial injury to the appellants even if the evidence does show several conspiracies. Under such circumstances the variance would not be fatal. *Berger v. United States*, 295 U. S. 78, 81; *McGunnigal v. United States*, 151 F. (2d) 162 (C. C. A. 1), certiorari denied No. 549, October Term, 1945, Supreme Court.

4. The Court did not err in refusing to direct the witness Hinman to produce the books of the Ed. Heuck Company, or in limiting the cross-examination of the witness Dean Heuck

Appellants contend that they should have been permitted, in their cross-examination of the government's witness Elroy Hinman, to require him to produce the books of the Ed Heuck Company for the purpose of refreshing the memory of the witness or testing his recollection. The only purpose the production of the books could have served would have been to determine whether the Ed Heuck Company had billed the government agency for the meat which had been diverted by the defendants. Hinman had not testified on direct examination with respect to the billing of the government for the meat in question but had merely stated that the receipted delivery tag returned to him by

Barral was "the delivery tag from which we prepare our billing against the War Shipping Administration for delivery to their agents, the United Fruit Company, for collection of our charges" (R. 96).

Appellants also contend that the government's witness Dean Heuck should have been permitted to answer their question as to who he billed for the 17,000 pounds of diverted meat and whether his company was ever paid for the meat. The witness had testified on direct examination that he supervised the filling of the meat order for *Sea Perch* and had loaded the truck parked on Sansome Street (R. 104-105). He did not testify as to the billing of the government for the meat.

Thus in both instances counsel for appellants was going beyond the scope of the direct examination in his questioning of the witnesses. Furthermore, at this time the government had introduced no testimony other than that quoted above with respect to the billing of the government for the meat. Counsel were anticipating the prosecution's presentation of evidence on this point. While it is settled that the right of cross-examination cannot be denied, it is equally well established that the scope of cross-examination is within the sound discretion of the trial court. *Madden v. United States*, 20 F. (2d) 289, 292 (C. C. A. 9), certiorari denied sub nom. *Parente v. United States*, 275 U. S. 554; and that is particularly true where the cross-examination is sought to be extended to matters not involved in the examination in chief. *Houghton v. Jones*, 68 U. S. 702; *Alpin v. United States*, 41 F. (2d) 495, 496 (C. C. A. 9).

Furthermore, there was no injury to the appellants since another government witness later testified that the United Fruit Company had received an invoice from the Ed Heuck Company, calling for payment to them for 66,000 odd pounds of meat and that the delivery tag and the invoice were sent to the New York office for payment out of a joint account established in accordance with the general agency agreement (R. 117-118, 120).

5. The Court did not err in limiting the cross-examination of the witness Barral

In the cross-examination of the witness Barral appellants' attorney asked the witness to what offense he had pleaded guilty. The government's objection was sustained. Thereafter on recross-examination by appellants' attorney, the witness testified that he didn't know how many charges he had pleaded guilty to and was asked whether he knew how long he could be sent to jail. The government's objection was sustained. Appellants now argue that the court's rulings prevented them from showing the witness was testifying under the promise or expectancy of receiving leniency.

Such a contention ignores the facts shown in the record. At the beginning of his testimony on behalf of the government this witness testified that he was one of the defendants in the case, that he had pleaded guilty and was awaiting the judgment of the court (R. 123). On cross-examination by an attorney for another defendant it was stipulated that the witness was presently in jail and the witness stated: "I don't

expect to get off easy because of what I am saying here in court. I am just willing to pay for what I did, that is all. I can't do nothing else'' (R. 143). It is apparent that the jury knew the essential facts concerning the witness' predicament. It was aware that he had pleaded guilty and was awaiting sentence and it had heard the witness testify that he did not expect leniency in return for his testimony.

Under such circumstances appellants' contention that he was prevented, by the court's rulings, from showing that the witness was testifying for the government in the hope of obtaining a more favorable sentence by the court, rings hollow. Certainly no prejudice on that score could exist. The questions which appellants propounded to the witness could not in any way have tended to show a hope for leniency on the part of the witnesses. It was clear that he knew he was subject to a penalty of imprisonment and that the penalty had not yet been imposed. Whether he knew the technical description of the offense to which he pleaded guilty or the maximum sentence which could be imposed is immaterial in considering whether or not he had a hope of leniency. And, of course, unless the credibility of the witness was shaken because an expectation of leniency influenced his testimony, this question had no bearing on the case. Also the ruling of the court with respect to these particular questions did not constitute a ruling, as appellants would have us believe, that they could not show the witness was testifying in the hope of receiving a favorable sentence.

Thus the situation here is not, as in the cases cited by appellants, one in which the appellants were prevented from showing there was some expectation of immunity or favorable consideration on the part of the witness.¹ As pointed out above, the scope of cross-examination is a matter within the sound discretion of the court. *Blitz v. United States*, 153 U. S. 308, 312. This principle was repeated by the court again in the case of *Alford v. United States*, 282 U. S. 687, in which it said (p. 694):

“The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.”

Accordingly, the trial court was acting within its discretion in sustaining the objection to appellants' questions and there was no prejudice resulting to appellants from such rulings.

6. The Court was correct in admitting the signed statement of appellant Chevillard

Appellant Chevillard contends that the court erred in admitting his signed statement in evidence over his objection on the ground that at the time of the

¹ In *Alford v. United States*, 282 U. S. 687, the Supreme Court said (p. 694): “The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error.” In *Farkas v. United States*, 2 F. (2d) 644 (C. C. A. 6), the court not only sustained objections to testimony tending to show bias on the part of the witness because of a hope for clemency but also refused an instruction that the jury might consider the fact of delayed sentence as bearing on such hope and expressly instructed counsel not to argue the matter as affecting the motives of the witness.

introduction of the statement the corpus delicti had not been established. This objection was without merit. The statement was put in evidence at the end of the government's case. At the time the statement was offered Hinman had testified as to his dealings with Rodriguez and Barral, various employees of the meat company and the United Fruit Company had testified as to the delivery of the meat, signing of the receipts and the steps taken toward payment for the meat. Barral had told the story of his participation and of his dealings with the two appellants, and the FBI agents had testified to the recovery of the meat. Certainly this was ample independent evidence to establish the corpus delicti of the crime charged, and the objection of the appellant was properly overruled.

7. The Court was correct in refusing to strike the statement obtained from appellant Chevillard

Appellant Chevillard contends that the court was in error in refusing to grant his motion at the close of the government's case to strike the statement which he had given to the Special Agents of the FBI. In support of this contention Chevillard argues that the evidence shows his statement was not voluntarily given and that its admission constituted a violation of the rule announced by the Supreme Court in *McNabb v. United States*, 318 U. S. 332. Thus Chevillard seeks to avoid his statement both under the long-standing rule that a confession must be freely and voluntarily given in order to be admissible,

and under the recent rulings of the Supreme Court with respect to the admissibility of evidence.

Chevillard was arrested by the Special Agents of the FBI at the Normandy Restaurant in San Francisco at about 1:10 a. m. on January 24, 1945 (R. 172). At that time he was told that he was being placed under arrest in connection with a truckload of meat that was taken by Barral from the Heuck Meat Company, and that the charge against him would be conspiracy to defraud the government (R. 177). He was immediately taken to the FBI field office in San Francisco (R. 172) where he was told that he had the right to have a lawyer and was asked whether he was willing to make a free and voluntary statement (R. 173). The special agents questioned Chevillard and prepared the statement from his answers (R. 175), discussing with him what should go in and what should be left out of the statement (R. 179). During the time the statement was being prepared the special agents procured sandwiches and milk which were offered to Chevillard, who drank the milk but refused the sandwiches, saying that he had just finished dinner shortly before he was arrested (R. 181). Chevillard read the statement, said it was true, and signed it voluntarily and acknowledged that no threats or promises had been made against him or to him (R. 181, 174). The statement was signed at about 5 a. m. and he was promptly removed to the City Prison. There was no further conversation (R. 181). A copy of the statement is set forth herein Appendix C.

There is nothing in this set of facts to indicate that the statement of Chevillard was given involuntarily

or that it resulted from coercion by the special agents. Having been informed of the reason for his arrest and the nature of the charge against him, he certainly was not put in the position of answering the questions propounded to him blindly and without knowledge of the object and purpose of the questioners. Nor was he required to answer the questions without assistance of counsel, or indeed at all, unless he wanted to. He knew that he would be allowed to obtain a lawyer and he was asked if he wanted to make the statement. While the statement which Chevillard signed was not written or dictated by him, it was prepared during his conversation with the special agents. Every effort was made to insure the veracity of the statement, the agents including only information given by Chevillard which they were convinced was truthful, and assented to by Chevillard.

Nor was any statement of fact included unless it met with the assent of Chevillard, who was afforded a real opportunity to object to the wording of the instrument, as is attested to by the argument between him and the agents as to the use of the word "agreement." Finally Chevillard read the statement, said it was true, signed it and acknowledged that no threats or promises had been made against him or to him. Moreover, Chevillard was offered food and drink during the course of his conversation with the agents.

Although Chevillard's attorney did not renew his motion to strike the statement either at the conclusion of Chevillard's testimony in his own behalf, or before the submission of the case to the jury, his own

version does not alter the matter. By his own testimony Chevillard admitted knowing that he was entitled to the services of a lawyer and that the agents did nothing to prevent him from obtaining one (R. 244). He admitted that he was asked to give a statement and that he said he would give a statement (R. 244). While he testified as to some arguments occurring during his conversations with the agents there is nothing in his own testimony to indicate coercion (R. 245-247). The agents were seeking the truth and the appellant Chevillard tried to hide it or gloss it over. Under these circumstances it is only natural that there would be a considerable amount of quibbling over language during the course of the preparation of the statement.

Accordingly the trial court was correct in refusing to exclude the statement as evidence against Chevillard. It should be noted parenthetically that the statement was limited to Chevillard and was not admitted as evidence against appellant Patron or the other defendants in the case (R. 166).

The foregoing facts do not sustain appellant's contention that the statement should have been excluded because the appellant had not been taken before a U. S. Commissioner or other committing magistrate prior to the time it was obtained. Confessions are not excluded solely because the confessor was in custody of the police at the time they were obtained. The McNabb case² itself is careful to point this out; it being there stated (p. 346):

² 318 U. S. 332.

The mere fact that a confession was made while in the custody of the police does not render it inadmissible.

Nor are confessions rendered inadmissible solely because at the time they were made the defendant had not been taken before a United States Commissioner or a committing magistrate. *United States v. Mitchell*, 322 U. S. 65. In that case the court stated the rule in the *McNabb* case as follows (p. 67):

Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.

Here we have neither inexcusable detention, nor the purpose of illegally extracting evidence from an accused. And there is no evidence of any continuous questioning for many hours under psychological pressure. The appellant Chevillard was apprehended together with his partner, Patron, at their place of business several hours after they and their co-partners in the illegal enterprise had completed the removal and storage of the meat. Special Agents of the FBI had witnessed the removal of the truckload of meat to the Millbrae Dairy, and were aware of the general details of the plan. Having observed the execution of a crime which involved the diversion of 17,000 lbs. of meat belonging to the government, the agents were in duty bound to arrest known participants and recover the diverted meat. Chevillard was

accordingly taken into custody at 1:10 a. m., an hour at which it was impractical, if not impossible, to take him before a United States Commissioner or other committing officer. There was, therefore, good reason for his detention during the early morning hours of January 24, 1945, without having been brought before a United States Commissioner or other committing officer.

Although the record is silent as to when appellant Chevillard was taken before a United States Commissioner or other committing officer,³ an arraignment before the United States Commissioner shortly after the opening of his office for business on the morning of January 24, 1945, would comply with the statutory requirements and those of the Supreme Court. Neither the statutes pertaining to arraignment by arresting officers⁴ nor the Supreme Court decisions set up a standard of conduct that is unreasonable or impractical. *United States v. Keegan*, 141 F. (2d) 248 (C. C. A. 2), reversed on other grounds, 325 U. S. 478, held that to expect an arraignment on the Fourth of July or the Sunday following would require a promptitude not contemplated by the statutes and upheld the admission of statements obtained from two of the defendants during those holidays and before arraignment. To exclude the statement of Chevillard

³ Appellant Chevillard did not see fit to include in the record evidence of the time when he was actually taken before a United States Commissioner in San Francisco, doubtless because this occurred on January 24, 1945, the day he was arrested.

⁴ U. S. C., Title 5, Section 300a; U. S. C., Title 18, Section 595.

solely because he was not taken before the committing officer during the early hours of the morning would, it is submitted, afford the statutes and the rule laid down by the Supreme Court, too drastic an interpretation.⁵

The Special Agents of the FBI, being good police officers, were endeavoring to ascertain the identity of all those who had participated in the diversion. It was their duty to do so. They were well aware of Chevillard's participation but they apparently had no information concerning the identity or role played by those in charge of or employed at the Millbrae Dairy. Under such circumstances an immediate questioning of all those arrested was necessary in order to ascertain if possible the identity of other culprits, for to delay the attempt to secure such information would enable the guilty parties to escape or to cover their part in the enterprise. The prompt interrogation of Chevillard in particular was further dictated by finding the receipt for the meat from the Chip Steak Co. to Pierre Barral in Chevillard's billfold and the slip of paper with the name, address, and telephone number of A. Vincenzini, who ultimately became a co-defendant, in Chevillard's topcoat pocket (R. 167-168). Both furnished important clues to

⁵ Compare *United States v. Mitchell*, 322 U. S. 65, wherein the confession, obtained shortly after defendant's apprehension, was held admissible even though the defendant was not arraigned until eight days later. It is thus apparent that mere illegal holding of the prisoner without arraignment will not void a confession voluntarily given immediately upon arrest.

other possible participants and the immediate questioning of Chevillard was necessary for the purpose of ascertaining their identity. Chevillard expressly consented to the interrogation, presumably with some hope that in this manner he could convince the agents he was innocent of any wrongdoing or explain away his conduct. Voluntary submission to questioning by those arrested is not without its advantages to the accused, especially where he is innocent of any wrongdoing.

Finally, the element of "continuous questioning for many hours under psychological pressure" referred to in the *Mitchell* case, and present in the other cases cited by appellants in their brief, is not present here. The total time elapsing between the beginning of the interrogation and the signing of the statement was not more than 3½ hours (R. 172, 173). During this time Chevillard was afforded an opportunity to partake of refreshments in the form of sandwiches and milk and he drank the milk (R. 181). This itself indicates the questioning was neither grueling nor intensive.

The actual writing of the statement began one hour after the beginning of the interrogation, that first hour being given over to denials on the part of Chevillard (R. 172, 174). The agents started to reduce the statement to writing when they believed Chevillard was telling the truth and it took approximately 2½ hours from that time to question appellant, get the facts straight and write out the statement in longhand. Once the statement was signed, there was no further interrogation. Accordingly, this is not a situation

where the confessor was worn down physically and mentally by long hours of continuous questioning without rest or refreshment.

In this respect the case at bar differs from *Gros v. United States*, 136 F. (2d) 878 (C. C. A. 9), wherein the appellant had been questioned many hours daily for five days, and *Runnels v. United States*, 138 F. (2d) 346 (C. C. A. 9), where appellant had been held in solitary confinement and questioned for 17 days, both of which were decided by this court and cited by appellants in their brief. *Ashcraft v Tennessee*, 322 U. S. 143, deals with similar protracted interrogation by state officers and is confined to narrow limits.

Finally, it is submitted that even if the admission of Chevillard's statement be regarded as erroneous it did not constitute such prejudicial error as to require the reversal of this case. The statement added nothing to the evidence previously adduced. In fact, in testifying on his own behalf appellant Chevillard admitted nearly all of the information contained in the statement to be true. It was only with respect to a relatively few facts that Chevillard denied the truth of facts incorporated in the statement. Under such circumstances, the admission of the statement could hardly have been prejudicial to Chevillard. This court has previously refused to reverse where the evidence, without consideration of the confession, is sufficient to sustain a conviction. *Paddy v. United States*, 143 F. (2d) 847, 852 (C. C. A. 9), certiorari denied 324 U. S. 855.

3. The Court correctly instructed the jury as to the criminal intent necessary to convict appellants

Appellants urge that the instruction by the District Court is erroneous on the ground that it "did not contain the element that the person accused of aiding and abetting another in the commission of a crime, must have a criminal intent and that such act of aiding and abetting must be done with the intent of having the ultimate act actually done and accomplished" (Pet. Br. p. 108). Assuming appellants' contention that one accused of aiding and abetting another in the commission of a crime must have an intent to aid and abet the ultimate criminal act to be correct, their objection has no merit for the reason that the trial court in its instruction said "A person who *knowingly* renders assistance, cooperation, and encouragement in the commission of an offense is one who aids and abets in the commission" (R. 264).

One who "knowingly" commits an offense forbidden by law certainly also "criminally intends" to do the act. It is difficult to understand how the appellants could knowingly assist in the diversion of 17,000 pounds of meat destined for troopships belonging to the government of the United States without having criminally intended to defraud the United States. The decision in *United States v. J. Greenbaum & Sons*, 123 F. (2d) 770, 773 (C. C. A. 2), is opposed to the appellants' contention. In that case, where the defendants were charged with presenting false pay-roll reports to an agency of the United States in violation of 18 U. S. C., Sec. 80, the District Court had gone so far as to charge the jury that

“intent” is not an element of the crime charged, yet the Circuit Court of Appeals for the Second Circuit held the error to be harmless and sustained the charge because it had emphasized that the jury must find defendant “knew the falsity of the pay-rolls in order to find him guilty”.

The instruction in the instant case is much more favorable to the defendants than was the instruction in the *Greenbaum* case. The court here has required that defendants must *knowingly* render assistance. The court did not say here that intent is not an element of the crime, but on the contrary devoted a full paragraph of its instructions to the “intent” that must exist in every crime (R. 262).⁶

Thus appellants pick out a part of the general charge to the jury and object to it as not specifically containing a statement on the element of criminal intent, and yet preceding by only three paragraphs the objected part of the instructions is this quoted statement that there “must exist” a “joint operation of act and intent” in “every crime.” Following this is a statement of what may constitute intent. Not only in this paragraph, but through the whole instructions to the jury runs the general tenor of the

⁶ The court charged: “In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty. Such intent is merely the purpose or willingness to commit such act. It does not require a knowledge that such act is a violation of law. However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own act.”

requirements—knowingly, wilfully and intentionally. Hence appellants are in the position of objecting merely because the instruction as to intent was not given in the particular language selected by themselves, plainly an untenable position. *Coffin v. United States*, 162 U. S. 664, 672.

9. There was no error in the failure to give specific instructions as to the possible bias of Barral and DeAngury, who had pleaded guilty

Appellants contend the court erred in refusing to give their requested instruction number three dealing with the credibility which might be accorded the testimony of Barral and DeAngury who had pleaded guilty and became government witnesses. They argue that the jurors should have been instructed that in determining the credibility of these witnesses they might take into consideration the fact that the witnesses had pleaded guilty and were awaiting sentence, and also any bias or hope of leniency which they might find to exist on the part of the witnesses because of their predicament.

Appellants wholly ignore the court's charge. At the very outset the court instructed the jury that "The fact that two defendants pleaded guilty creates no presumption of any kind as to the guilt or innocence of the three defendants now on trial" (R. 256). The court gave the usual instruction relative to the right of the jury to pass on the credibility of various witnesses (R. 259-260) and admonished the jury to consider the following elements: "The circumstances under which the witness testifies; his demeanor and manner on the witness stand; his intelligence; *the*

connection or relationship which he bears to the government or to the defendants; the manner in which he might be affected by the verdict; the extent to which he is contradicted or corroborated by other evidence, if at all; and any other matter which reasonably sheds light upon the credibility of the witness." [Italics supplied.]

Finally, the court specifically charged with respect to the credibility of accomplice testimony. It said:

An accomplice is defined to be one concerned with others in the commission of a crime. It is a settled rule of law in this country that even accomplices in the commission of a crime are competent witnesses, and that the government has the right to use them as such; it is the duty of the court to admit their testimony and that of the jury to consider it. *The testimony of accomplices, however, is always to be received with caution and weighed and scrutinized with great care, and the jury should not rely upon it unsupported, unless it produces in their minds a most positive conviction of its truth.* If it does, the jury should act upon it (R. 263). [Italics supplied.]

It has been repeatedly held that instructions similar to the foregoing amply protect the rights of the defendants and more particular comments by the court have not been required. *Cossack v. United States*, 82 F. (2d) 214 (C. C. A. 9) certiorari denied 298 U. S. 654; *Outlaw v. United States*, 81 F. (2d) 805 (C. C. A. 5) certiorari denied 298 U. S. 665; Cf. *Caminetti v. United States*, 242 U. S. 470, 495.

The refusal to give the instruction requested by appellants must be regarded in the light of the charge

actually given. *Pine v. United States*, 135 F. (2d) 353 (C. C. A. 5) certiorari denied 320 U. S. 740. It is apparent from the foregoing excerpts of the charge that the jury was fully instructed as to the care with which it should receive and weigh the testimony of the accomplices. Under these circumstances, it is difficult to perceive how the appellants were prejudiced in any way by the failure to name the witnesses who were accomplices and point out their possible bias against appellants and hope of leniency or immunity.

10. The Court was correct in its instruction with respect to circumstantial evidence

Appellants contend that the court erred in refusing to give their requested instruction No. 37, to the effect that when independent facts and circumstances are relied upon to establish by circumstantial evidence the guilt of the defendant, each material, independent fact or circumstance in the chain of facts relied upon must be established to a moral certainty and beyond a reasonable doubt, and that if any fail to be so established a verdict of not guilty must be returned (R. 289). This contention can be answered easily by a reference to the decision by this court in *Shepard v. United States*, 236 F. 73, 79 (C. C. A. 9), where the lower court had instructed the jury that:

Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

This instruction is similar to the one given by the trial court in the case at bar and was objected to by de-

fendants in the *Shepard* case for much the same reason, namely:

It is objected to this instruction that it failed to state that each circumstance essential to the conclusion of guilt must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance, and that the hypothesis of guilt should flow naturally from all the circumstances and be consistent with them all.

This Court upheld the lower court by saying (pp. 79-80):

The instructions of the court with respect to a reasonable doubt covered this objection, and, in particular, where the court instructed the jury that: "You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt."

In the instant case the court charged in substance that if upon a consideration of the whole case they were satisfied to a moral certainty and beyond a reasonable doubt of the guilt of any of the defendants, they should so find, irrespective of whether the evidence was circumstantial or direct. The court also charged that in cases of circumstantial evidence facts should be proven which are not only consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis (R. 262, 272). This particular instruction was reiterated (R. 283) by the court after the appellants' attorney had voiced his opinion that the court had not included such a statement in the instruction (R. 276).

It is obvious from a comparison of the *Shepard* case and this case that the lower court here was as solicitous of defendants' interests in its instructions to the jury, as was the court in the *Shepard* case. The lower court here required that the jury apply the same test in weighing circumstantial evidence, i. e., it must convince them to a moral certainty and beyond a reasonable doubt—as in weighing direct evidence; and in addition instructed the jury that facts proved by circumstantial evidence must be not only consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis.

**11. The refusal to give appellants' requested instruction
Number Eleven did not constitute error**

Appellants contend that the refusal of the trial court to give their requested instruction with respect to the second count of the indictment constitutes reversible error. By that request appellants sought to have the jury instructed to return a verdict of acquittal unless it found that the appellants in fact signed the War Shipping Administration receipt for the meat or caused it to be signed or were instrumental in having it signed. Appellants argue that the theory of their defense was that they had no part in the signing of the receipt and did not even know it was issued and that they were entitled to an explicit instruction on their theory.

Appellants' theory and their requested instruction go too far. It was not necessary for the prosecution to show that appellants had a part in the actual signing of the receipt. All that was required for the jury to find the defendants guilty was that they knew or

could be reasonably expected to know that their acts would naturally and probably result in concealing and covering up a material fact in a matter within the jurisdiction of a government department or agency by means of a trick or scheme. Thus it was not necessary to prove appellants took any part in the signing of the receipts. Compare *McGunnigal v. United States*, 151 F. (2d) 162 (C. C. A. 1), certiorari denied No. 549, October Term, 1945, Supreme Court.

The court in fact charged that the jury must be convinced beyond a reasonable doubt and to a moral certainty that the defendants or any of them performed the acts set out in the indictment, which acts had been previously described (R. 265-266). This, coupled with the other portions of the charge as to circumstantial evidence, intent and the like, sufficiently informed the jury of what it must find in order to convict appellants. It has been previously pointed out that there is ample evidence sustaining a verdict of guilty.

CONCLUSION

For the reasons heretofore set forth it is respectfully submitted that the judgment of the District Court should be affirmed.

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FEBRUARY 1946.

APPENDICES TO BRIEF FOR THE UNITED STATES

APPENDIX A

STATUTES INVOLVED

18 U. S. C., Sec. 80 reads:

Whoever shall make or cause to be made or present or cause to be presented for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U. S. C., Sec. 88 reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy * * * not more than \$10,000, or imprisoned not more than two years, or both.

APPENDIX B

THE INDICTMENT

Counts Two and Three of the indictment, under which counts the appellants were convicted and sentenced, read (R. 2-8):

SECOND COUNT

(Title 18 U. S. C. A. Section 80)

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully, and feloniously cover up and conceal by a trick, scheme, and device a material fact within the jurisdiction of the War Shipping Administration, a department and agency of the United States of America, the material facts so covered up and concealed by a trick, scheme and device being as follows:

That the said defendants, well knowing at all times herein mentioned that the said War Shipping Administration had ordered from the Ed Heuck Company of San Francisco (a limited [2] partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; and A. Pasquini, limited partner; hereafter re-

ferred to as the Ed Heuck Company) approximately 64,793 pounds of meat, to be delivered by the said Ed. Heuck Company to the said War Shipping Administration, diverted and withheld from said shipment approximately 17,832 pounds of said meat with the intent and for the purpose of converting the same to their own use, and with intent to defraud the said War Shipping Administration covered up and concealed said material fact of said diversion and conversion by the said defendants of said approximate amount of 17,832 pounds of meat by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

THIRD COUNT

(Title 18 U. S. C. A. Section 88)

And the said Grand Jurors upon their oaths do further present that the said defendants Julio Rodriguez, Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, Lucien L. De Angury, and Angelo Italo Vincenzini, on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, within the Southern Division of the Northern District of California and within the jurisdiction of this Court, did, in violation of Title 18 U. S. C. A. Section 88, unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers persons whose names are to the Grand Jurors unknown, to commit offenses against the United States to wit, to defraud the United States in violation of Title 18 U. S. C. A. Section 80 in the manner following, to wit: [3]

That the said defendants at all times herein mentioned, knowing that the War Shipping

Administration, a department and agency of the United States, had placed a purchase order with the Ed Heuck Company of San Francisco, California (a limited partnership consisting of Edward L. Heuck, general partner; Dean Heuck, limited partner; and A. Pasquini, limited partner; hereinafter referred to as the Ed Heuck Company) for approximately 64,793 pounds of meat for delivery to the said War Shipping Administration and for its use, conspired, confederated, and agreed together to cause the said Ed Heuck Company to present a claim, false in part, to the said War Shipping Administration for a total amount of approximately 64,793 pounds of meat, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat would actually be delivered to the said War Shipping Administration by the said Ed Heuck Company; and by the said defendants making and causing to be made false statements and representations in a matter within the jurisdiction of the said War Shipping Administration, to wit, that approximately 64,793 pounds of meat had been received by the said War Shipping Administration from the said Ed Heuck Company, when in truth and in fact, as the said defendants and each of them then and there well knew, approximately only 46,961 pounds of meat had actually been delivered to and received by the said War Shipping Administration; and by the said defendants covering up and concealing by trick, scheme, and devise a material fact relating to a matter within the jurisdiction of said War Shipping Administration, to wit; said material fact being that the said defendants had diverted to their own use and personal gain approximately 17,832 pounds of meat from a [4] shipment consisting of approximately 64,793 pounds of meat purchased by and intended for the use of said

War Shipping Administration from the said Ed Heuck Company, and covered up and concealed said material fact by the trick, scheme, and device of signing and causing to be signed, and issuing and causing to be issued by the said War Shipping Administration, a receipt to the said Ed Heuck Company for approximately 64,793 pounds of meat.

That during the existence of said conspiracy and in furtherance of the same, and to effect the objects thereof, in said Division and District and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to wit:

1. That on or about the 16th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Julio Rodriguez and Pierre Francois Barral met and held a conversation with one Elroy Hinman;

2. That on or about the 18th day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Pierre Francois Barral, George Patron, Fernand Chevillard, and Lucien L. De Angury met and held a conversation;

3. That on or about the 22nd day of January, 1945, the said defendant Fernand Chevillard telephoned from the City and County of San Francisco, State of California, to the said defendant Angelo Italo Vincenzini at the City of South San Francisco, State of California;

4. That on or about the 23rd day of January, 1945, in the City and County of San Francisco, State of California, the said defendants Lucien L. De Angury and Pierre Francois Barral drove a truck loaded with approximately 17,832 pounds of meat from the City and County of San Francisco, State of [5] California, to the City of Millbrae, County of San Mateo, State of California;

5. That on or about the 23rd day of January, 1945, in the City of Oakland, County of Alameda, State of California, the said defendant Julio Rodriguez signed a receipt from the Ed Heuck Company for 64,793 pounds of meat;

6. That on or about the 23rd day of January, 1945, in the City of Millbrae, County of San Mateo, State of California, the said defendants Pierre Francois Barral, Fernand Chevillard, George Patron, Clarence Valentine Jacky, and Lucien L. De Angury unloaded from a truck approximately 17,832 pounds of meat and placed the same in cold storage on the premises of the defendant Clarence Valentine Jacky.

FRANK J. HENNESSY,
United States Attorney.

TOM C. CLARK,
Assistant Attorney General.

[Endorsed]: A true bill, D. Bosschart,
Foreman.

Presented in open court and ordered filed
Jan. 31, 1945.

C. W. CALBREATH,
Clerk. [6]

APPENDIX C

The statement given by appellant Chevillard to agents of the Federal Bureau of Investigation reads (R. 168-172):

JANUARY 24, 1945,
San Francisco, California.

I, Fernand Chevillard, hereby make the following voluntary statement to Special Agents Ronald A. Wilson and Lee M. Fallaw of the Federal Bureau of Investigation, first having been told by them that I have the right to have an attorney, that I do not have to make any statement and that any statement I do make may be used against me in court. No threats or promises have been made to me and no inducements have been offered me. I have known Pierre Barral for about six months. He would come to the Normandie Restaurant to see me and my partner, George Patron. I knew that Pierre Barral was a chef on ships. About two or three months ago Barral offered to sell me some meat off his ship, but I did not buy any. For the past ten days Barral has been coming to the Normandie Restaurant from his ship. About Thursday or Friday, [141] Jan. 18 or 19, 1945, Barral came to the Normandie Restaurant and told Patron and me that he was going to have about 15,000 pounds of meat to sell, that this meat was to be bought for the ship, 30,000 lbs. in all, but he wouldn't need it all on the trip and wanted to sell 15,000 lbs. of it before it was put on the ship. Barral offered to sell me 15,000 lbs. of New York Cuts, Filets, rib and lamb at 40¢ per pound. He said he wanted to sell the whole 15,000 lbs. at the same time. I told him I was broke and

couldn't buy the meat, but that I would inquire around to see if I could find anyone to buy the meat and I told Barral I would also try to find a place for the meat to be stored. Every day after that Barral asked me if I had found anyone to buy the meat or if I had found a place to store it. Barral told me he would have the meat in a truck and we had nothing to worry about except to find a place to store the meat. George Patron was present when Barral made this statement. This agreement to try to sell the meat and find a storage place for it was between Pierre Barral, George Patron and myself. We did not have an understanding about what payment was to be made to Patron and myself for finding a purchaser for this meat or for finding a storage place for it, but I expected to receive some payment from the purchaser of the meat or to profit in some way from this transaction. After having discussed the matter with Barral I made inquiries of several persons as to whether they would be interested in purchasing this meat. I also made inquiries regarding refrigerator space to store the meat. Angelo Vincenzini, a butcher who lives at 540 San Antonio Ave., Lomita Park, Calif., told me he thought I could get storage space for the meat at Millbrae Dairy and then advised me there was [142] storage space there which I could get. That night at the Normandie Restaurant I told Barral and Patron there was storage space available. Barral said the truck driver didn't want to come and I said "the deal's off" because I realized the deal was wrong. Barral had told Patron and me that the meat belonged to the Merchant Marine. On Jan. 23, I was at 35 Lake St., when I got a phone call about 4:30 p. m. from Mrs. Patron, who said George Patron had told her to get in touch with me by any means possible and tell me to go to Millbrae. I then drove to Millbrae in my car

and saw Mr. Jacky of the Chip Steak Co., who has the Millbrae Dairy. I told Mr. Jacky I had come for the storage space that Angelo Vincenzini had talked to him about. I then waited for the truck with the meat to arrive. I knew that George Patron would accompany the truck. Between 8:30 and 9:00 P. M., Patron came in his car to the refrigeration plant. Barral was in the truck with its driver, Lucian, whom I know by sight, when it drove up at the same time. Mr. Jacky was the only other person present. Patron, Barral and the truck driver unloaded the meat from the truck while I checked the weights of the meat with Mr. Jacky. I kept a record of the weights in my address book, notations indicating the total weight of the meat was 15,875 lbs. After the truck was unloaded Mr. Jacky asked me in whose name the receipt should be made and I told him Mr. Barral. The copy of the receipt was given to me instead of to Mr. Barral as Mr. Barral was absent changing his clothes at the time. However, the receipt would probably have been given me anyway, so I could get the meat for a purchaser if I had decided to go through with the deal, as Mr. Barral was leaving town in a short time. I paid Mr. Jacky \$30 [143] of my own money on account for storage, which was to be at one cent a pound per month, and we agreed to settle the balance the next day. I made these arrangements with Mr. Jacky. The receipt was turned over by me to Special Agents Wilson and Fallaw on Jan. 24, 1945. I also turned over to them my notebook showing notations I made checking the meat off the truck. After the truck was unloaded I told the others that I would see them later and drove back to San Francisco alone in my car. I have not discussed the meat with anyone since that time. I got back to the Normandie Restaurant about 11:00 P. M. The hostess, Mrs. Sarah Hughes, gave me a slip of paper

on which was written "Order for 15,000—about 75" and which bore the signature of George, the chef at the Troc, a night club on Geary Blvd. I had discussed the meat with George and told him I knew where he could get meat, and I took this note to mean he would buy 15,000 lbs. of meat at 75¢ a lb. The price indicates to me that he wanted filets or New York cuts. I had also talked to Angelo Vincenzini and told him he could probably get some of this meat at 40¢ or 50¢ per pound. He said he might be interested in buying some of the meat later. I told Angelo Vincenzini all about the meat and where it was coming from and how it was being obtained, and he said he wanted to stay out of jail. This was on Monday, Jan. 22, 1945. During the past five or six days I mentioned this meat to several other chefs, whose names I do not know, thinking they might want to buy some of the meat.

I have read this statement on five pages and it is true.

FERNAND CHEVILLARD.

Ronald A. Wilson, Special Agent, FBI—
1/24/45.

Lee M. Fallaw, Special Agent, FBI, San
Francisco, California. [144]

No. 11,018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4,
Attorney for Appellants.

FILED

MAY 16 1946

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
The insufficiency of the second count of the indictment.....	1
As to the insufficiency of the evidence to support count two	4
As to errors in the court's instructions.....	7
Errors in the refusal to give requested instructions.....	7
Conclusion	10

Table of Authorities Cited

Cases	Page
Borgia v. United States, 78 Fed. (2d) 550.....	5
Collins v. United States, 20 Fed. (2d) 574.....	5
Collins v. United States, 65 Fed. (2d) 545.....	6
Collins v. United States (C.C.A. 9), 253 Fed. 609.....	2
Floren v. United States, 186 Fed. 961.....	2
Johnson v. United States, 95 Fed. (2d) 813.....	3
May v. United States, 199 Fed. 53.....	2
People v. Kane, 27 A. C. 709	9
Williamson v. United States, 207 U. S. 425, 52 L. Ed. 278..	3

Codes

Penal Code:

Section 1096	9
Section 1096A	9

Texts

42 C. J. S., p. 990	3
---------------------------	---

Subject Index

	Page
The insufficiency of the second count of the indictment.....	1
As to the insufficiency of the evidence to support count two	4
As to errors in the court's instructions.....	7
Errors in the refusal to give requested instructions.....	7
Conclusion	10

Table of Authorities Cited

Cases	Page
Borgia v. United States, 78 Fed. (2d) 550.....	5
Collins v. United States, 20 Fed. (2d) 574.....	5
Collins v. United States, 65 Fed. (2d) 545.....	6
Collins v. United States (C.C.A. 9), 253 Fed. 609.....	2
Floren v. United States, 186 Fed. 961.....	2
Johnson v. United States, 95 Fed. (2d) 813.....	3
May v. United States, 199 Fed. 53.....	2
People v. Kane, 27 A. C. 709	9
Williamson v. United States, 207 U. S. 425, 52 L. Ed. 278..	3

Codes

Penal Code:

Section 1096	9
Section 1096A	9

Texts

42 C. J. S., p. 990	3
---------------------------	---

No. 11,018

IN THE

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FERNAND CHEVILLARD and GEORGE PATRON,	
	<i>Appellants,</i>
VS.	
UNITED STATES OF AMERICA,	
	<i>Appellee.</i>

APPELLANTS' CLOSING BRIEF.

A reading of the brief for appellee indicates a short reply thereto, as the attorneys for appellee have, in some instances, not directed their arguments to the points raised by appellants but have raised their own questions and supplied answers thereto.

THE INSUFFICIENCY OF THE SECOND COUNT OF THE INDICTMENT.

The United States argues that the indictment is sufficient and that if any additional facts were necessary in order to prepare appellants' defense such facts could have been procured by a bill of particulars. There are two answers to this contention.

An indictment must contain facts charging the commission of a crime and no deficiencies in this regard can be supplied by a bill of particulars. (*Floren v. United States*, 186 Fed. 961, 964; *May v. United States*, 199 Fed. 53; *Collins v. United States* (C.C.A. 9), 253 Fed. 609.)

The second answer to the Government's contention is that a motion for a bill of particulars was made and denied by the trial Court. (R. 15.)

The Government argues the sufficiency of the second count on the following grounds: that the indictment charged that the defendants diverted certain meat from a shipment from the Ed Heuck Company to the WSA and converted such meat to their own use, that this diversion was concealed and covered up by causing the WSA to issue to the Ed Heuck Company a receipt for the full amount of the shipment. Merely to allege that the doing of a certain act accomplished a certain result is not sufficient. The act described must be one that would reasonably and probably bring about the claimed result. Just how the issuance of a receipt by the WSA could have concealed any fact from that Government Agency rests solely in the realm of surmise and conjecture. Besides, this count of the indictment does not allege that the shipment delivered was less the poundage involved in the diversion and conversion. From all that appears from the indictment the WSA received every pound of meat ordered. The indictment does not allege that the purloining of this meat was done after the delivery to the WSA,

but, on the contrary, alleges that it was extracted from the shipment to be delivered to the WSA. The indictment is only susceptible of the construction that any receipt issued by the WSA to the Ed Heuck Company could only have resulted in misleading the Ed Heuck Company.

An indictment is to be construed against the pleader. The language used in an indictment must necessarily import the offense charged and if susceptible of a different interpretation or if susceptible of two interpretations, one showing the commission of the crime and the other showing the accused's innocence, the interpretation leading to innocence must be adopted. (*Williamson v. United States*, 207 U. S. 425, 458, 52 L. Ed. 278, 294; *Johnson v. United States*, 95 Fed. (2d) 813; 42 C. J. S., p. 990.)

In the instant case count two of the indictment is susceptible of the construction that the WSA received the whole amount of meat ordered, and thus the issuance of a receipt in like amount could not have concealed any material fact from that agency of the Government. The indictment on its face fails to state any fact showing how the issuance of the receipt could have concealed any material fact from the knowledge of the WSA. No act committed by the WSA could possibly be charged as a concealment of a material fact on the part of the appellant.

Assuming everything set forth in the second count to be correct it fails to establish the commission of any offense on the part of appellants.

The Government meets our objection to the failure of the indictment to set forth the receipt on the ground that "the receipt referred to in count two of the indictment is not, as in counterfeiting or forgery, the subject matter of the litigation and therefore need not have been set out in haec verba in the indictment". On the contrary, the receipt is the subject matter of the litigation. It is the trick, scheme, and device on which the Government relied.

**AS TO THE INSUFFICIENCY OF THE EVIDENCE
TO SUPPORT COUNT TWO.**

The Government seeks to uphold the convictions as to the second count on the theory that as appellants aided and assisted in the diversion of the meat it was not necessary that they be present when the receipt was signed and refer to three cases in support of this contention. The contention is unsound and finds no support in the cases cited. The very argument presented by the Government shows that the activities of appellants were confined solely to procuring the truck load of meat from the Ed Heuck Company and did not embrace the concealment of such fact from the War Shipping Administration. The diversion of the meat was all that appellants agreed to participate in and this diversion was and could have been successfully accomplished without concealing anything from the War Shipping Administration.

The cases relied on by the Government must be considered in the light of the facts disclosed by the record

in each such case. Thus, in *Borgia v. United States*, 78 Fed. (2d) 550, the defendants were charged with attempting to defraud the United States of taxes on distilled spirits, with possession and custody of a still, etc., and with conspiring to do such things, all resulting from selling certain materials to people unlawfully operating a still. This Court held that defendants having knowledge of the use to which the materials were to be applied, together with other acts done by the defendants, justified the conclusion that they conspired with the owners of the still to its illegal operation. This reasoning would apply if the appellants herein were charged with conspiring to divert or steal the meat, but does not apply to a wholly unnecessary act of which they had no knowledge and of which there was no proof that they ever knew such act was to be committed.

The case of *Collins v. United States*, 20 Fed. (2d) 574, is subject to the same criticism. There the defendant was charged as a principal and aider and abettor in the robbery of a mail train. The facts show that he conspired with those who actually perpetrated the robbery. Defendant was charged with the stealing, taking and carrying away and with aiding and assisting in so doing five United States mail bags. These particular five bags never came into his possession. The Court held that he conspired that the mail train be robbed and he was guilty as a principal in such robbery.

In both of the foregoing cases the conviction was upheld because the record showed an actual agreement

on the part of the defendant to do the very act charged in the indictment.

In the other case of *Collins v. United States*, 65 Fed. (2d) 545, a sheriff and his deputy were charged with having conspired with others to violate the National Prohibition Act by importing and transporting intoxicating liquors. The evidence showed an actual agreement on the part of defendants and their participation in the prior arrangements for the commission of the very act set forth in the indictment. In the instant case the agreement was only to steal the meat, not to cause a false receipt to be issued by the WSA.

The Government argues, against our contention, that the facts failed to show that defendants knew the meat belonged to the War Shipping Administration, that the facts "create a logical inference that they were aware of such facts". In a criminal case it requires more than a logical inference to establish a material fact. Such fact must be established to a moral certainty and beyond a reasonable doubt.

The argument that several hours after the bill had been receipted by the checker knowledge then acquired by appellants that the meat was stamped for the Government cannot relate back and make the issuance of the receipt a criminal act of the appellants. Even then, at such time, appellants had no knowledge that such receipt had been issued by the WSA. Not only intent is necessary to constitute the crime set forth in the indictment but knowledge is also essential.

AS TO ERRORS IN THE COURT'S INSTRUCTIONS.

The Government attempts to uphold the erroneous instructions given by the district judge as to what constitutes one an aider and abettor in the commission of a crime on the grounds that the Court used the word "knowingly" and this was the same as telling the jury that a criminal intent was necessary. One may knowingly commit acts which result in the commission of a crime without intending that such crime be committed. One may innocently do such things and not be subject to prosecution or punishment.

To tell the jury that there must exist a joint operation of act and intent in every crime is not the same as telling the jury that an aider and abettor must act with an intent that a specific crime be accomplished.

ERRORS IN THE REFUSAL TO GIVE REQUESTED INSTRUCTIONS.

The failure of the Court to instruct according to appellants' requested instruction No. 3, to the effect that in determining the credibility of Barral they had a right to take into consideration the fact that he had pleaded guilty and was awaiting sentence, in determining whether he was testifying under the expectation of immunity or leniency and that his testimony was therefore biased and prejudiced, was highly prejudicial. This instruction was not cured by the other portions of the charge. General rules for determining the credibility of all witnesses were insufficient to properly present the Barral situation to the jury. The

general instruction that the testimony of an accomplice should be received with caution, etc., could as easily apply to one who was not awaiting sentence as to one who was. Such instruction did not cover the points raised in the requested instructions.

The refusal to give the requested instruction dealing with each link in the chain of circumstantial evidence and that such link must be established to a moral certainty and beyond a reasonable doubt was not cured by a general instruction that the entire evidence must be consistent with guilt and inconsistent with any other rational conclusion. The law of circumstantial evidence is that each material fact in the chain of proof must be proven to a moral certainty and beyond a reasonable doubt. This is entirely different from allowing a jury to consider every essential fact, irrespective of whether each such fact produces conviction to a moral certainty and beyond a reasonable doubt, and from all such facts, irrespective of the degree to which each is proven, allow the jury to draw the ultimate conclusion of guilt. Jurors easily could find that certain material facts were not established to a moral certainty and beyond a reasonable doubt, yet upon the whole case arrive at the conclusion of the guilt of the defendant. The law does not allow verdicts based upon such reasoning and appellants were entitled to an instruction which would properly guide the jury in such a vital matter.

The Supreme Court of California, in a case decided on February 19, 1946, has clearly pointed out the right of a defendant to have specific instructions given as

to a material element in either the charge or the defense. Section 1096 of the California Penal Code contains a statutory instruction on the doctrine of reasonable doubt. Section 1096A provides that no further instruction on the subject need be given. In *People v. Kane*, 27 A. C. 709, the Court gave the statutory instruction on reasonable doubt. Defendant requested specific instructions relative to particular elements of the charge and that each such particular element had to be established to a moral certainty and beyond a reasonable doubt. The trial Court refused to give the requested instruction on the theory that the general statutory charge was sufficient. The Supreme Court held that defendant was entitled to such specific instructions, stating:

“The proposed instructions, although not grammatically perfect, are correct and simple statements of law pertinent and material to defendant’s theory of the case and show its application to the evidence introduced. In *People v. Eckert* (1862), 19 Cal. 603, 605, this court said: ‘The fact pointed out by this instruction it was material for The People to prove, in order to establish the defendant’s guilt under the other circumstances of this case, and as the charge given by the Court as to reasonable doubt, though appropriate, was general in its terms, the defendant had a right to ask an instruction that if there was a reasonable doubt as to this essential fact, the defendant should have the benefit of it.’ Defendant here was entitled to have the jury advised directly and clearly as to the law applicable to the defense to the charge of robbery in order that they should have clearly in

mind that the taking, even though it was with a display of force, to constitute robbery, must have been actually against the will of Miss Echols, not with her connivance or abetment, and not merely against the will of the owner of the money. The essential, and to a layman somewhat fine, distinction between robbery and grand theft, the definitive attributes of an accomplice (Pen. Code, §§ 31 and 1111), and the application of the doctrine of reasonable doubt to the most important and difficult question presented to the jury, should not have been left either wholly unexplained or derivable only from inference."

CONCLUSION.

All other points discussed in the Government's brief have been fully answered in the opening brief of appellants.

Dated, San Francisco,
March 18, 1946.

Respectfully submitted,

LEO R. FRIEDMAN,

Attorney for Appellants.

No. 11,018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERNAND CHEVILLARD and GEORGE PATRON, vs. UNITED STATES OF AMERICA,	<i>Appellants,</i> <i>Appellee.</i>
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APPELLANTS' PETITION FOR A REHEARING.

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*Attorney for Appellants
and Petitioners.*

FILED

JUL 10 1946

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
The court erred in holding that the entire record had not been brought before the court.....	1
The court erred in holding that there was no error in limiting the cross-examination of Elroy Hinman and Dean Heuck..	2
The court erred in holding the evidence sufficient to establish the offense charged in count two of the indictment.....	6

Table of Authorities Cited

Cases	Pages
Alford v. United States, 282 U. S. 687, 75 L. ed 624.....	5, 6
Creek Co. v. Goleb, 232 Fed. 445.....	5
De Witt v. Skinner, 232 Fed. 443.....	5
Heard v. United States, 255 Fed. 829.....	5
Union Trust Co. v. Woodrow Mfg. Co., 63 Fed. (2d) 602..	5

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IN THE

**United States Circuit Court of Appeals
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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable Francis A. Garrecht, Senior Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

Come now appellants Chevillard and Patron and petition that the decision of this Court rendered on June 12, 1946, be set aside and a rehearing of the cause be granted for the reasons hereinafter stated.

**THE COURT ERRED IN HOLDING THAT THE ENTIRE RECORD
HAD NOT BEEN BROUGHT BEFORE THE COURT.**

The decision of this Court states that "the record does not contain all the evidence". In making this

statement the Court was in error. The bill of exceptions prepared on behalf of appellants Chevillard and Patron was settled by stipulation. (R. 290.) This stipulation alleged that the bill "sets forth all of the evidence and all of the proceedings relating to the trial of said defendants". The order of the trial judge settling the bill of exceptions (R. 291) likewise contains the statement that the bill is true and correct and "as containing all of the evidence and proceedings relating to the trial and conviction, motion for a new trial and motion in arrest of judgment of said cause".

As a matter of fact, the bill of exceptions contained all of the evidence produced at the trial and as admitted against either Chevillard or Patron. True, there was evidence in the case that was admitted solely against one or another of the defendants other than Chevillard or Patron but not having been admitted against appellants this was not evidence in the case against them. The decision should be corrected in this particular.

THE COURT ERRED IN HOLDING THAT THERE WAS NO ERROR IN LIMITING THE CROSS-EXAMINATION OF ELROY HINMAN AND DEAN HEUCK.

It will be remembered that when the witness Hinman was produced by the Government he testified that he was manager of the Ed Heuck Company. He further testified as to the signed delivery receipt or tag and that it was on the seat of the truck containing the 17,000 pounds of meat. This was elicited on direct examination. (R. 95.) He further testified that the

delivery tag was the document from which the Heuck Company prepared their bill against the War Shipping Administration for the collection of their charges. (R. 96.) He then testified as to what the delivery receipt or tag included.

On cross-examination the witness testified that the tag was prepared under his supervision, that he had general supervision over the preparation and sending of bills (R. 100), that he did not know whether the Heuck Company had sent to the Sea Perch or the War Shipping Administration meat equivalent to the amount that was in the truck on Sansome Street, that he had supervision of the books of the Heuck Company and that they would contain a record of what was billed against the United Fruit Company, War Shipping Administration, together with the quantity and amount of deliveries that the bill represented and that those books were under his general supervision. (R. 103.) At this point appellants requested the Court to order the witness to produce the books and the Court declined to do so.

Dean Heuck called by the Government testified as to the delivery receipt or tag (R. 104) and that the 17,000 pounds of meat which were put in the truck that was not delivered were included in the tag. (R. 105.) On cross-examination he was not allowed to answer the questions as to who was billed for the meat or whether his company was ever paid for the meat.

This Court upheld the limiting of the cross-examination as aforesaid on the ground that Hinman did not mention the books in his direct examination and that

no showing was made as to what facts, if any, appellants expected to prove by the books and that appellants' counsel "did not indicate the matter or matters as to which he desired to test the witness' recollection or to impeach his testimony". In upholding the ruling as to the witness Heuck this Court stated that the questions asked of this witness were properly disallowed because they related to matters about which the witness had not testified in his direct examination.

The importance of the matters sought to be elicited by appellants cannot be over estimated. Fraud was the gravamen and gist of the charges. Whether or not a fraud had been perpetrated, a fraudulent concealment indulged in or a conspiracy to have the Heuck Company file a false claim against the War Shipping Administration were matters of paramount importance in the trial. If, in fact, no fraud or concealment was perpetrated on the Government or its agency, if they knew by the bills that were sent for payment that 17,000 pounds of meat was not to be paid for or if the Government or its agency knew that the amount of meat had been supplied in another manner or at another time then no fraud was perpetrated upon the Government or its agency, no material fact was concealed.

This Court's opinion confines the rule of cross-examination within too narrow a limit. Cross-examination is a matter of right. It is not limited to the exact fact testified to by a witness on direct examination. It was not necessary that these witnesses mention a bill sent to the Government. If the general subject matter was

touched upon in direct examination it could be amplified on cross-examination in any manner pertinent to the issues.

The rule is that cross-examination should not be confined to the specific or particular questions asked on direct examination but the cross-examination should be confined to *the subject matter of the direct examination*. (*De Witt v. Skinner*, 232 Fed. 443; *Owl Creek Co. v. Goleb*, 232 Fed. 445, 448; *Union Trust Co. v. Woodrow Mfg. Co.*, 63 Fed. (2d) 602; *Heard v. United States*, 255 Fed. 829.) The subject matter of the direct examination was the meat that was delivered to the Sea Perch and the meat that was diverted from such shipment together with the delivery tag enumerating the various cuts and quantities of meat. The subject matter of the direct examination also was the delivery and nondelivery of meat to the Government, all of which was a predicate for the alleged fraud and concealment practiced upon the Government. To this extent all contemporary acts of the Heuck Company that would negative any fraud or concealment practiced upon the Government were proper subjects of inquiry upon cross-examination and the question of the billing made by the Heuck Company to the Government was directly connected with the amount of meat delivered to the Government.

In *Alford v. United States*, 282 U. S. 687, 75 L. ed. 624, the Supreme Court has expressly held (1) that cross-examination is a matter of right, (2) that cross-examination is necessarily exploratory, and (3) that

the cross-examiner need not disclose the purpose of his questions nor what he expects to elicit thereby.

If the cross-examination should have developed that the Government was advised that 17,000 pounds of meat were to be diverted from the shipment and that the Government was to receive either an additional 17,000 pounds or the bills were to be reduced by 17,000 pounds in amount, then the entire charges set forth in the indictment would have fallen. This was a vital matter in the case and to cut off all examination on this point *in limine* was prejudicial and reversible error. (*Alford v. United States*, supra.)

**THE COURT ERRED IN HOLDING THE EVIDENCE SUFFICIENT
TO ESTABLISH THE OFFENSE CHARGED IN COUNT TWO
OF THE INDICTMENT.**

The Court's opinion does not recite the evidence in the case and merely contains the statement that the evidence was ample to justify the conviction.

In considering the second count of the indictment we believe that the Court has confused the liability of a co-conspirator with the culpability of one charged with conspiracy. It must be remembered that the second count of the indictment did not charge conspiracy. It charged a substantive offense. Where one is charged with the crime of conspiracy he is chargeable as a co-conspirator with all acts done by other co-conspirators both before and during the accused's membership in the conspiracy. This, however, only

applies to where the question of being guilty of the crime of conspiracy is the issue. Where one is charged with a substantive offense the liability for independent acts of others involved in such substantive offense cannot be chargeable against the accused, where accused had no knowledge thereof.

The second count of the indictment charged the appellants with resorting to a trick and device to conceal a material fact from the War Shipping Administration and that this was accomplished by causing the War Shipping Administration to issue the receipt in question. There was no evidence showing that either Chevillard or Patron knew anything about a receipt to be signed or issued by the War Shipping Administration or that any such receipt had been signed or issued. The entire purloining of the truckload of meat could easily have been accomplished without the signing of any such receipt. In fact, the evidence fails to disclose that either Chevillard or Patron knew that the meat was to be delivered to the Government, their sole knowledge and belief being, *as repeatedly represented to them by Barral*, that the meat was to come from the meat company as meat of the meat company. We firmly believe that this point merits further consideration by this Court.

Furthermore, the opinion of this Court contains no reason showing how the issuance of any receipt by the War Shipping Administration, *i.e., an act of the War Shipping Administration*, could result in concealing a fact from the War Shipping Administration.

For like reasons the holding of this Court that count two of the information stated a crime is erroneous.

Dated, San Francisco,
June 10, 1946.

Respectfully submitted,

LEO R. FRIEDMAN,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
June 10, 1946.

LEO R. FRIEDMAN,
*Counsel for Appellants
and Petitioners.*

